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Current subscription: $15.00 per year. Single issue, $3.75. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

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VOLUME 51 JUNE-SEPTEMBER 1980 NUMBER 2

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TABLE OF CONTENTS

ARTICLES

THE *Mens Rea* REQUIREMENT OF ACCOMPLICE LIABILITY IN AMERICAN CRIMINAL LAW—KNOWLEDGE OR INTENT ..... *Louis Westerfield* 155

THE DECLINE AND NEAR FALL OF STATUTORY SEXISM IN MISSISSIPPI ..... *M. Carolyn Ellis* 191

COMMENT

GUARDIANSHIPS AND CONSERVATORSHIPS OVER PERSONS AND ESTATES IN MISSISSIPPI 239

RECENT DECISIONS

SEVENTH AMENDMENT—JURY TRIALS—COMPLEXITY EXCEPTION REQUIRED BY PROCEDURAL DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT (*In re Japanese Electronic Products Antitrust Litigation*, 3d Cir. 1980) 271

CIVIL RIGHTS—FEDERAL JURISDICTION—EXHAUSTION OF ADEQUATE AND APPROPRIATE STATE ADMINISTRATIVE REMEDIES IS A PREREQUISITE FOR JUDICIAL REVIEW UNDER SECTION 1983 (*Patsy v. Florida International University*, 5th Cir. 1981) 283

TORTS—NEGLIGENCE—THE SUDDEN EMERGENCY DOCTRINE IS ABOLISHED IN MISSISSIPPI (*Knapp v. Stanford*, Miss. 1980) . 301

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THE *MENS REA* REQUIREMENT OF ACCOMPLICE LIABILITY IN AMERICAN CRIMINAL LAW — KNOWLEDGE OR INTENT*

*Louis Westerfield***

Introduction

At common law, parties to felonies were categorized as either accessories or principals according to the character of their participation in the felonious conduct.[1] An accessory was one who gave countenance to the actual perpetrator without being actually or constructively present,[2] while a person present at the scene of the crime was a principal.[3] The party actually committing the crime was a principal in the first degree,[4] while a party standing by and assisting in the commission of the crime was a

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* This article was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

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[1] *See* 4. W. Blackstone, Commentaries *34-38 (common law view of parties to crime); W. LaFave & A. Scott, Criminal Law 495-96 (1972) (same). The distinctions were applicable only in felony situations because accomplice liability for misdemeanors did not exist. G. Dix & M. Sharlot, Criminal Law 368 (2d ed. 1979); S. Kadish & M. Paulsen, Criminal Law and Its Processes 369 (3d ed. 1975); W. LaFave & A. Scott, Criminal Law 495-98 (1972).

[2] At common law, an accessory was categorized as either an accessory before the fact or an accessory after the fact. The former procured, counseled, or commanded the principal in the crime; the latter comforted or assisted a known felon after the crime was committed. *See* 4 W. Blackstone, *supra* note 1, at *36-37 (discussing the types of accessories); J. Miller, Handbook of Criminal Law 236-44 (1934) (same).

[3] Neither the first nor the second principal actually had to be present at the situs of the crime. Where the first degree principal guided or left some instrument that caused the criminal result, or the second degree principal aided and abetted the principal in the first degree from a distance, both could be held constructively present. W. LaFave & A. Scott, *supra* note 1, at 497.

[4] 1 C. Torcia, Wharton's Criminal Law § 38 (14th ed. 1978).

principal in the second degree.[5] Although both principals and accessories were punishable to the same degree,[6] the manner of proving guilt differed sharply among several distinct categories of accomplices.[7] For example, because an accessory before the fact was not at the scene of the crime, it was necessary to prove affirmatively his intent, and this usually was done by showing that he had a personal stake in the criminal venture.[8] On the other hand, since the principal in the second degree (also termed aider and abettor) was at the scene of the crime, his intent was inferred from his presence and actions if he acted with knowledge that he was contributing to a criminal venture.[9]

Strict adherence to this scheme of classification gave rise to technical rules of jurisdiction and procedure that often allowed an accomplice to go free despite overwhelming evidence of his guilt.[10] In an attempt to overcome these problems, Congress[11]

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[5] *Id.*

[6] *See generally* Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 613 (1941) (discussing punishment of principals).

[7] Early writers defined parties according to the manner in which they participated in criminal conduct without mentioning the *mens rea* requirements. Principals were defined as direct participants, and accessories before the fact were defined as instigators. 4 W. BLACKSTONE, *supra* note 1, at *34; M. HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 215-16 (C.P. Glazebrook ed. 1972).

Blackstone seems to indicate, however, that the community of unlawful intent was necessary only in the case of the accessory before the fact, and the second degree principal's guilt was determined independently of the other parties. 4 W. BLACKSTONE, *supra* note 1, at *36. This is not to say that there were never circumstances where a community of unlawful intent was necessary in determining the guilt of a principal in the second degree. There were times when the principal in the second degree aided the actual perpetrator by his mere presence at the scene of the crime; thus, it was necessary to prove that he was present pursuant to a prior agreement to aid. G. WILLIAMS, CRIMINAL LAW 353 (2d ed. 1961).

[8] *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (accessory must associate with the criminal venture).

[9] *See* Morei v. United States, 127 F.2d 827, 836 (6th Cir. 1942) (in some instances, inference can be drawn that one who drives an automobile used in commission of a crime has knowledge; here no such inference could be drawn).

[10] Jurisdictional problems arose because trial could be held only at the situs of the crime. The situs of the crime was usually defined as the situs of the acts that made the accessory liable, rather than the state where the ultimate crime occurred. Procedural problems resulted when there was a variation between the charge and the proof. For instance, if the defendant was charged as an accessory before the fact, the evidence introduced at trial had to indicate the degree of participation in the crime. If the evidence showed participation as a second degree principal, the defendant would be acquitted.

and many state legislatures[12] enacted revised criminal codes that seemed to abrogate all distinctions between accessories before the fact and principals. More important, some of these revised statutes grouped accessories before the fact and principals in the second degree together under the general term "aider and abettor."[13] In applying these statutory revisions to actual cases, however, courts found it necessary to refer to the common law to define the *mens rea* requirements for accomplice liability.[14] By failing to analyze adequately the common law distinctions between parties to a felony, the courts have created a continuing controversy concerning the *mens rea* requirements for accomplice liability.

The position that the controversy stems from a misunderstanding of the common law distinctions is supported and explained in Part I by a discussion of the origins and development of *mens rea* requirements for accomplice liability. Part I will be-

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Another troublesome rule required that the principal be convicted before the accessory. For a thorough discussion of the jurisdictional and procedural implications of the common law classification of parties, see Perkins, *supra* note 6, at 609-14.

[11] 18 U.S.C. § 2(a) (1976) provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal crime is a principal. This statute, in effect, treats an accessory before the fact like a principal. The classification of accessory after the fact was retained, however, in 18 U.S.C. § 3 (1976).

[12] *E.g.*, ARIZ. REV. STAT. ANN. § 13-304 (1978) (non-conviction of principal is no defense for an accessory); CONN. GEN. STAT. ANN. § 53a-9 (West 1972) (same); MISS. CODE ANN. § 97-1-3 (1972) (accessory before the fact deemed a principal regardless of whether principal convicted previously); S.C. CODE § 16-1-50 (1977) (accessory before the fact may be convicted regardless of whether the principal has been convicted); *see* MODEL PENAL CODE § 2.04(b), Comment, at 38-39 (Tent. Draft No. 1, 1953) (accessory before the fact may be convicted even though principal has been acquitted).

[13] *E.g.*, 18 U.S.C. § 2 (1976) (aiders and abettors include those traditionally classified as accessories before the fact and as second degree principals); Illinois Criminal Code of 1961 § 5-2(c), ILL. ANN. STAT. ch. 38, § 5-2(c) (Smith-Hurd 1972) (same); 18 PA. CONS. STAT. ANN. § 306 (Purdon 1973) (same). Mississippi and many other states have adopted legislation which declares that accessories before the fact are principals. MISS. CODE ANN. § 97-1-3 (1972). Other forms of legislation have been adopted that produce substantially the same results. For instance, some statutes "maintain the common law classifications but provide that conviction of the principal is not a pre-condition to the prosecution of an accessory before the fact." W. LAFAVE & A. SCOTT, *supra* note 1, at 500.

[14] *See, e.g.*, Morei v. United States, 127 F.2d 827, 830 (6th Cir. 1942) (common law definition of principal in second degree); People v. Bracken, 68 Ill. App. 2d 466, 216 N.E.2d 176, 179 (1966) (common law definition of accessory before the fact); Commonwealth v. Leach, 455 Pa. 448, 317 A.2d 293, 294 (1974) (same).

gin with a discussion of the approach taken in the federal courts, but will include various state court approaches as well. The legal and public policy aspects of the controversy will be addressed in Part II of this article. Finally, Part III will undertake an analysis of possible solutions to the controversy. The first solution is based on the nature of the assistance given by the accomplice, while the second solution involves the creation of a bi-level standard of proof in conjunction with a bi-level penalty.

I. Origins and Development of the Controversy

A. Early Developments in the Federal Courts

The controversy concerning the *mens rea* requirements for accomplice liability in the United States is framed by two decisions rendered in United States courts of appeals. In *United States v. Peoni*,[15] the Second Circuit adopted a very restrictive position. Peoni had been convicted as an accessory to the possession of counterfeit money. The charges stemmed from Peoni's sale of counterfeit bills to Regno, who subsequently sold the bills to Dorsey. All three persons knew the bills were counterfeit, and the only pertinent question was whether Peoni could be found guilty as an accessory to Dorsey's possession.[16] After reviewing the history of accomplice liability under federal statutory law and English common law,[17] the court concluded that a "purposive attitude" to promote criminal conduct was a requisite to imposition of accomplice liability.[18] The court determined that Peoni's sale of the bills to Regno did not exhibit a "purposive attitude" to promote Dorsey's possession of the bills, and thus reversed his conviction.[19]

In recognizing that Peoni might have been Regno's accessory, however, the court admitted that liability as an accessory

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[15] 100 F.2d 401 (2d Cir. 1938).

[16] *Id.* at 401-02.

[17] *Id.* at 402-03.

[18] *Id.* at 402. The court argued that the statutory and English definitions were based not on the probability that a criminal act would result from the accessory's conduct; rather, they required that the accessory participate in the crime "as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.*

[19] *Id.* at 402-03.

would be possible even in the absence of direct evidence that the accomplice had a specific intent to contribute to the crime.[20] In such a situation, the intent would have to be inferred from an association with the venture. Thus, the Second Circuit established a test for proof of accomplice liability that could be met either by a substantial association with the criminal venture or direct evidence of a specific intent to contribute to the success of the criminal venture.

A less restrictive approach was taken by the Fourth Circuit in *Backun v. United States*,[21] in which the defendant had been convicted as an accomplice of transporting in interstate commerce merchandise that he knew had been stolen. The proof showed that Backun had sold the merchandise in New York to a person who transported it to North Carolina for resale. Because the *corpus delicti* of the crime was the transportation, the determinative fact was that there was no market for the merchandise in New York, and an implied condition of the sale was the transportation of the merchandise across state lines.[22] The court reasoned that since the ordinary citizen has a moral obligation to prevent the commission of a felony, if the citizen provides aid with knowledge that the aid will assist the commission of a felony, he should be held liable as an accomplice, regardless of whether he had a specific intent to facilitate the commission of the crime. In this respect, the *Backun* court rejected the *Peoni* approach of limiting accomplice liability to those who associate themselves in the criminal venture or purposely seek to bring about the success of the crime, and instead formulated a test based on assistance given by the accomplice with knowledge of the criminal purpose.[23]

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[20] *Id.* at 403. The court left open the possibility that Peoni might have been an accessory to Regno's possession because giving him the bills would have exhibited a "purposive attitude" to bring about that possession. Since Dorsey was a step further down the chain of possession, however, the court found the evidence insufficient to show that Peoni purposely sought to bring about Dorsey's possession. *Id.* at 402-03.

[21] 112 F.2d 635 (4th Cir. 1940).

[22] *Id.* at 638.

[23] *Id.* at 636-37. The court did not totally reject the "stake in the criminal venture" criterion for accomplice liability, it simply refused to limit liability to those who had a stake. Those who aided what they knew to be a criminal enterprise were equally guilty, regardless of the presence of a personal stake. *Id.*

The *Backun* and *Peoni* cases not only exemplify the controversy, but also belie the basic problem in modern attempts to arrive at an acceptable definition of *mens rea* requirements in accomplice liability. This problem results from an incorrect application of the common law distinctions confusing the proof requirements for accessories before the fact and principals in the second degree. The *Peoni* court set forth the "purposive attitude" test, applicable at common law only to accessories before the fact, as the test for all accomplice liability. On the other hand, the *Backun* court applied the knowledge standard, applicable at common law only to principals in the second degree, to an accessory before the fact. Thus, the net effect of the *Backun* and *Peoni* decisions is a disregard for the distinctions in proof requirements for accessories before the fact and principals in the second degree.

Since the United States Supreme Court's decision in *Nye & Nissen v. United States*,[24] the approach of the federal courts has been substantially in line with *Peoni*.[25] In *Nye & Nissen*, a corporation and several of its principals were convicted of conspiring to defraud the government and of filing false statements. In affirming the conviction of one of the principals of the corpora-

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[24] 336 U.S. 613 (1949).

[25] *See, e.g.*, United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972) (showing of specific intent to aid in crime required), *cert. denied*, 410 U.S. 929 (1973); United States v. Bryant, 461 F.2d 912, 919-20 (6th Cir. 1972) (defendant's knowledge and presence are not enough, he must have specific intent); United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971) (crime of aiding and abetting requires specific intent); United States v. Tijerina, 446 F.2d 675, 677 (10th Cir. 1971) (more than mere presence required, must show knowledge and intent).

Prior to its decision in *Nye & Nissen*, the Supreme Court had adopted a similar position in several cases based on theories of conspiracy very similar to theories of accomplice liability. *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943) (defendant not only knew of illegal conduct, but actively aided in its commission); United States v. Falcone, 311 U.S. 205, 210-11 (1940) (defendant must know of conspiracy; knowledge of some illegal acts not sufficient).

A majority of states also follow the aiding with intent approach. *See, e.g.*, State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976) (active participation must be shown; knowledge and presence not sufficient); State v. Irby, 423 S.W.2d 800, 803 (Mo. 1968) (defendant must be associated with criminal venture); State v. Harrison, 81 N.M. 324, 466 P.2d 890, 893 (Ct. App. 1970) (defendant must share the criminal intent of the principal); Hawpetoss v. State, 52 Wis. 2d 71, 187 N.W.2d 823, 826 (1971) (defendant must intend that his conduct assist some criminal act).

tions, the Court held that imposition of accomplice liability depended upon a showing that the defendant associated himself in the criminal venture.[26] Despite this definitive statement, the Fourth Circuit still adheres, at least in dicta, to its position that knowledge alone might support the imposition of accomplice liability.[27]

B. State Court Approaches to the Problem

The Model Penal Code[28] and many states[29] have adopted the "purpose" standard of accomplice liability as delineated in *Peoni*. For a person to be classified as an accomplice under the Model Penal Code, he must solicit, agree, or attempt to aid another in the commission of an offense for the purpose of promoting or facilitating the commission of the offense. Although many state criminal codes contain identical or similar language, they vary regarding the use of the words "intent" and "purpose." The definitional aspects of these rules, however, are not as important for the purpose of analysis as are the patterns of construction exhibited by the state courts, which are not always consistent with the statutory definitions of aiding and abetting. For purposes of analysis, the state court decisions concerning the minimal requirements for accomplice liability are divided into four categories: (1) those requiring proof of purposeful conduct; (2) those requiring proof of a pecuniary interest or conspiracy; (3) those allowing an inference of intent from knowledge and circumstantial evidence; and (4) those requiring knowledge only.

1. Proof of Purposeful Conduct Approach

Courts in New York and New Jersey, in an attempt to ad-

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[26] 336 U.S. at 619-20.

[27] *See* United States v. Eberhardt, 417 F.2d 1009, 1013 (4th Cir. 1969) (knowledge of unlawful purpose sufficient).

[28] MODEL PENAL CODE § 2.06(3)(a), at 33 (Proposed Official Draft 1962).

[29] *E.g.*, ARK. STAT. ANN. § 41-303 (1977) (accomplice must act with the purpose of promoting the offense); CONN. GEN. STAT. ANN. § 53a-8 (West 1972) (accomplice must act intentionally to cause another to commit a crime); DEL. CODE. ANN. tit. 11, § 271 (1979) (accomplice must intend to promote or facilitate the offense); GA. CODE ANN. § 26-801 (1977) (same); HAWAII REV. STAT. § 702-222 (same); Illinois Criminal Code of 1961, § 5-2, ILL. ANN. STAT. ch. 38, § 5-2 (Smith-Hurd 1961) (same).

here strictly to the principles of *Peoni*, have confused common law concepts of accomplice liability. The confusion, generated by an unquestioned adherence to *Peoni* without understanding clearly the common law concept of accomplice liability, is illustrated vividly in two cases emanating from the appellate courts in those states. In the New York case of *People v. Clarke*,[30] the appellant gave a gun to a friend, who, in the appellant's presence, gave the gun to a third person who they knew was planning to commit a robbery. Since the appellant did not share in the proceeds of the robbery, the court reasoned that he did not have an association with or a stake in the criminal venture sufficient to evidence a purposive attitude to assist in the commission of the crime.[31] In this respect, it might be said that the New York court extended the "purpose requirement" to unreasonable proportion, except that the appellant was also amenable to felony charges under the New York "facilitation" statute then in effect.[32] This case illustrates the problems of basing a general rule of liability on a rationale that was designed to deal with a specific stituation. The New York court has repeated the *Peoni* mistake of defining accomplice liability in terms that reflect the common law *mens rea* requirements for accessories before the fact, while ignoring the common law requirements for principals in the second degree.

New Jersey apparently has made the same mistake. In *State v. Sims*,[33] several codefendants had been convicted of aiding and abetting one another in an attempt to murder two police officers. Although the defendants were at the scene, armed, and

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[30] 43 A.D.2d 834, 351 N.Y.S.2d 14, 15 (App. Div. 1974); *accord*, People v. La Belle, 18 N.Y.2d 405, 412, 222 N.E.2d 727, 730-31, 276 N.Y.S.2d 105, 110 (1966) (intent required to establish liability for aiding and abetting); People v. Monaco, 14 N.Y.2d 43, 46, 197 N.E.2d 532, 535, 248 N.Y.S.2d 41, 44 (1964) (must show personal design to kill); People v. La Bruna, 66 A.D.2d 300, 414 N.Y.S.2d 380, 381 (App. Div. 1979) (accessory must share intent of principal actor to be held liable for crime by actor).

[31] 351 N.Y.S.2d at 15.

[32] The facilitation statute created a separate crime with reduced punishment for one rendering aid, believing that the recipient of the aid intends to commit a crime. N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980). For a discussion of New York's facilitation statute, see notes 116 through 143 and accompanying text *infra*.

[33] 140 N.J. Super. 164, 355 A.2d 695, 700-01 (1976).

acting in concert,[34] the New Jersey court reversed the convictions because the jury had not been instructed properly. Specifically, the court held that accomplice liability may not be imposed unless a "community of purpose" is found between the principal and the accomplice.[35] Since at common law this element applied only to accessories before the fact, the court clearly ignored the fact that the accomplices in *Sims* were at the scene of the crime and, thus, would have been convicted at common law as principals in the second degree.

A major problem with this approach is the imposition upon prosecutors of an almost unattainable level of proof in *all* accomplice situations. Proof of a purposive attitude is almost entirely dependent upon circumstantial evidence. In most states, if the prosecution relies upon circumstantial evidence to prove an element of a crime it will be required to prove its case not only beyond a reasonable doubt, but also to the exclusion of every reasonable hypothesis consistent with innocence.[36]

For example, in the Florida case of *Douglas v. State*,[37] the defendant had been convicted as an accomplice to an assault and robbery. The proof showed he waited in the getaway car as his companion actually committed the crimes, and he drove the car away.[38] The Florida court reversed the conviction because, in light of the defendant's argument that he was an innocent bystander, the evidence did not clearly show a purposive attitude to aid the commission of the crime.[39] Thus, under Florida's application of the law the defendant was released, whereas under common law he would have been denominated a principal in the

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[34] 355 A.2d at 697.

[35] *Id.* at 700-01. The appellate court misconstrued not only the common law *mens rea* requirement for accomplices, but also an earlier decision by the New Jersey Supreme Court, State v. Madden, 61 N.J. 377, 294 A.2d 609 (1972). *Madden* held that if several persons participate in an assault resulting in death, the participants might be guilty in "different degrees depending upon their respective participation and intent." 294 A.2d at 616.

[36] *See, e.g.*, Lockett v. State, 262 So. 2d 253, 254 (Fla. Dist. Ct. App. 1972) (where proof rests solely upon circumstantial evidence, proof must not only be consistent with guilt, but also inconsistent with any other reasonable hypothesis).

[37] 214 So. 2d 653, 654-55 (Fla. Dist. Ct. App. 1968).

[38] *Id.* at 654.

[39] *Id.* at 655; *cf.* State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976) (sufficient that circumstantial evidence excludes any rational hypothesis of innocence).

second degree, and intent would have been inferred from his presence and assistance at the scene of the crime.

2. Pecuniary Interest or Conspiracy Approach

Several states have adopted standards of proof for aiding and abetting that depend upon a showing that the defendant was to receive some pecuniary gain for his assistance in the crime or was associated in some other way with a criminal conspiracy. For example, in *Commonwealth v. Harvard*,[40] the Massachusetts Supreme Court reversed the conviction of a defendant for arranging an illegal narcotics transaction because the defendant had acted only as an intermediary between the seller and buyer and had received no pecuniary benefits for his efforts.[41] The Oklahoma Supreme Court reached a similar result in *Jones v. State*,[42] holding that an intermediary agent who received no financial benefit could not be convicted as an aider and abettor unless he was a member of a conspiracy.[43]

Both *Jones* and *Harvard* ignored or downplayed the question whether the accomplices actually instigated the sales or merely responded to requests for assistance by buyers seeking a seller.[44] This should have been the key issue in the case, rather than whether a conspiracy existed between the defendants and sellers or whether the defendants had a pecuniary interest in the sales. The reasoning of the courts reflects a concern with facts having little or no bearing on the proof requirements for aiding and abetting illegal narcotics transactions. The facts upon which

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[40] 356 Mass. 452, 253 N.E.2d 346, 349 (1969).

[41] 253 N.E.2d at 347-48. *But see* United States v. Manna, 353 F.2d 191, 192-93 (2d Cir. 1965) (conviction as an accomplice not dependent upon monetary gain).

[42] 481 P.2d 169 (Okla. Crim. App. 1971).

[43] *Id.* at 173. Although the court used the terms "common scheme" or "conspiracy" in the disjunctive sense, the requirements under either theory are the same: the defendant must have an interest in the sale or be hired by the seller to promote the sale. *Id.*; *see* Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (defendant's profit from sale of stolen goods led to criminal liability); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (aiding and abetting requires purposive attitude and stake in outcome of the criminal venture); State v. Ortega, 77 N.M. 7, 419 P.2d 219, 227 (1966) (aiding and abetting requires partnership in the crime).

[44] In both *Jones* and *Harvard* the states' evidence indicated the defendants had initiated the narcotics transaction. 481 P.2d at 172; 253 N.E.2d at 348.

the courts relied, however, are determinative of whether a defendant will be allowed to escape liability under what is known as the "accommodation agency" or "procuring agent" defense.[45] When the evidence indicates that an intermediary acted at the behest of an undercover agent, the intermediary is not a "seller," since he acted for the buyer. If the intermediary, however, was in business with the seller or acted as the seller's agent, he will be liable even though he acted as a procuring agent. Therefore, the inquiry into whether a conspiracy existed or whether the agent received financial renumeration should be for the purpose of determining if the procuring agent defense is available to the defendant, rather than for determining the evidence necessary to prove aiding and abetting. In this respect, the *Jones* and *Harvard* decisions are based on a faulty premise which ignores the theoretical and purposeful distinctions between conspiracy and accomplice liability. This strained construction of the accomplice statutes results from the lack of a viable alternative for dealing with persons whose acts do not approach the same de-

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[45] The procuring agent defense originally was available under national and state prohibition acts. United States v. Moses, 220 F.2d 166, 169 (3d Cir. 1955). For a discussion of the procuring agent defense under the prohibition laws, see Annot., 24 L.R.A.N.S. 268, 268-70 (1910) (list of cases in which procuring agent defense was allowed and denied); Annot., 28 L.R.A.N.S. 334, 334-35 (1910) (same). It provided an affirmative defense for persons who acted as agents of a purchaser but earned no profit from the sale. *See, e.g.*, United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1955) (introducing the buyer to the seller and vouching for the seller was not selling); United States v. Sawyer, 210 F.2d 169, 170 (3d Cir. 1954) (defendant who, acting on buyer's behalf, made purchase and delivered to buyer, was not a seller); People v. Branch, 13 A.D.2d 714, 213 N.Y.S.2d 535, 535 (1961) (defendant who acted solely as buyer's agent and received no pecuniary gain not a seller). *See also* 22 U. KAN. L. REV. 272, 275 (1974) (procuring agent defense available only to non-seller acting as agent of buyer without personal profit).

The accommodation agency defense was available to a defendant who made a purchase of narcotics in accommodation of an undercover agent. *See, e.g.*, Durham v. State, 280 S.W.2d 737, 739 (Tex. Crim. App. 1955) (because she received no remuneration, defendant's actions were not as seller but merely as agent).

Federal narcotics laws, 21 U.S.C. §§ 802(8), (11), 841(a)(1) (1976), and many state drug laws, *e.g.*, MISS. CODE ANN. § 41-29-105(g) (Supp. 1980) (delivery includes all actual and attempted transfers), *and* TEX. STAT. ANN. art. 4476-15 § 1.02(8) (1976) (same), have abolished the defenses by making it illegal to distribute narcotics by sale, gift, or otherwise. *See* United States v. Hernandez, 480 F.2d 1044, 1046 (9th Cir. 1973) (federal statutes exclude the procuring agent defenses entirely); Posey v. State, 515 S.W.2d 286, 288 (Tex. Crim. App. 1974) (accommodation agent defense not allowed because defendant failed to prove she knew she was acting for undercover agent).

gree of approbation as do the acts of their principals.

The preceding discussion is not intended to criticize the courts for failing to adhere to distinctions between the law of procuring agent and aiding and abetting, but rather is intended to illustrate the dangers inherent in a system which forces appellate courts to engage in doctrinal manipulations to ameliorate the harsh and sometimes unfair effects of present laws. In *Jones*, the confusing evidence did not indicate that the defendant deserved to be punished as a seller of drugs. The jury, presented with clear evidence of at least some guilt[46] and confronted with the decision to acquit or convict, followed the trial court's instructions and convicted the defendant. The appellate court, realizing that the defendant did not deserve the harsh penalties attached to the crime, faced a dilemma: the jury had convicted the defendant under the law as it was presented, and the appellate court, seeking to ameliorate the harshness of that decision, was forced to find a mistake of law. In its attempt to find a mistake of law, the court confused the related but distinct concepts of procuring agents and aiding and abetting. The answer to the problem is to revise the law of accomplice liability so that it reflects realistically the degree of culpability and wrongdoing of each party to a crime, imposing penalties appropriate to each of those degrees.

3. Inference of Intent from Circumstantial Evidence Approach

One group of cases has held that the intent required for the imposition of accomplice liability may be inferred from circumstantial evidence. These cases hold that, once knowledge is proved, the slightest circumstantial evidence indicating purposeful actions will suffice for a finding of intent.

In *State v. Dirgo*,[47] a conviction for robbery by means of aiding and abetting was based upon circumstantial evidence that placed the appellant in the victim's apartment and linked him to the stolen property and getaway car.[48] The Nebraska Supreme

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[46] *See* note 44 *supra*.

[47] 196 Neb. 36, 241 N.W.2d 351 (1976).

[48] 241 N.W.2d at 353-54.

Court found this evidence sufficient to permit the jury to find not only that Dirgo was involved in the robbery, but also that he acted in furtherance of the common design. The court simply reasoned that evidence of the defendant's presence at the scene of the crime, along with other circumstantial evidence of his participation in the crime, was sufficient to prove intent.[49]

Although the Nebraska court's reasoning in the *Dirgo* case is an acceptable position, the failure by many courts to establish more definite guidelines provides great potential for abuses. In *State v. Irving*,[50] the appellant was convicted of aggravated robbery as the driver of the getaway car. The evidence showed that the appellant went to the scene of the crime to dissuade his brother from committing the robbery, and drove the robbers away only after they jumped into his car when the police began shooting.[51] The conviction, based entirely on circumstantial evidence on the issue of intent, was affirmed by the Kansas Supreme Court.[52]

4. The Knowledge Only Approach

In England, providing articles essential to the commission of a crime with knowledge that they are to be used for unlawful purposes is sufficient to constitute aiding and abetting.[53] This assumption arises not because intent does not have to be proved, but rather because there is a presumption that a person intends to bring about the "natural and probable consequence of his acts."[54]

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[49] *Id.* at 354.

[50] 212 Kan. 735, 538 P.2d 670 (1975).

[51] 538 P.2d at 673.

[52] *Id.* at 674.

[53] National Coal Bd. v. Gamble, [1959] 1 Q.B. 11, 23.

[54] *Id. National Coal Board* attempted to divorce the concept of criminal intent from knowledge. Some English cases recognize the concept of oblique intention. This concept is applicable when a consequence, although not directly intended by the accused, was foreseen by him either as a substantial likelihood or probable result. *E.g.*, Regina v. Bullock, [1955] 1 W.L.R. 1, 5 (1954) (car loaned with knowledge of intended illegal use); Rex v. Stearne, [1947] 1 K.B. 997, 1003 (presumed intent to assist wartime enemy by broadcasting in Germany). *See generally* P. Jones & R. Card, Introduction to Criminal Law 32-33 (8th ed. 1976) (discussing oblique intention).

Oblique intention, however, can be characterized as first degree knowledge. Where a

California, after many years of uncertainty,[55] appears to have moved toward a similar theory of accomplice liability. The present theory began to evolve in 1966 in *People v. Samarjian*,[56] a court of appeals decision holding that evidence that the defendant forged parimutuel betting tickets, knowing they were to be used as genuine tickets, was sufficient to support a charge of aiding and abetting.[57] Subsequent opinions by courts of appeals, however, equivocated on the issue of *mens rea* in accomplice liability; at least one case required the same intent required for the crime itself,[58] while another case required aiding with knowledge of the perpetrator's criminal intent.[59] In 1974, the California Court of Appeals held in *People v. Standifer*[60] that conviction as an aider and abettor required only a finding that the defendant intended to aid an act which he knew was criminal.[61]

The *mens rea* requirement for accomplice liability in California was crystallized in *People v. Germany*.[62] Appellant Ger-

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party has first hand knowledge of the circumstances, he is presumed to "act intentionally in relation to them." Roper v. Taylor's Central Garages (Exeter), Ltd., 2 T.L.R. 284. Some scholars believe it is wrong to punish oblique intention in the same manner as desire in all cases. It has been pointed out, for instance, that under the moral doctrine of double effect, a person is less culpable for the unintended effects of his actions even if he must have known they would occur. P. JONES & R. CARD, *supra*, at 32.

Likewise, many states have abandoned the use of the term intent and now define mental elements solely in terms of purpose or knowledge. *E.g.*, CONN. GEN. STAT. ANN. § 53a-10 (West 1972) (affirmative defense that there was complete and voluntary renunciation of criminal purpose allowed). *Contra, e.g.*, MISS. CODE ANN. § 97-1-5 (1972) (knowledge and intent requirement). Under the Model Penal Code's definitions, a person acts purposely when he consciously desires to bring about a certain result; a person acts knowingly when he is aware to a practical certainty that his conduct will bring about a certain result. MODEL PENAL CODE § 2.02(2)(a)-(b), at 25-26 (Proposed Official Draft, 1962).

From the preceding discussion, it is apparent that regardless of the label a court gives the mental element in accomplice liability cases, what is actually required and described by courts is knowledge as defined in earlier English decisions, the Model Penal Code, and many state statutes.

[55] *See* People v. Standifer, 38 Cal. App. 3d 733, 743-44, 113 Cal. Rptr. 653, 660 (1974) (prior case law inconsistent).

[56] 240 Cal. App. 2d 13, 49 Cal. Rptr. 180 (1966).

[57] 49 Cal. Rptr. at 185.

[58] People v. Vasquez, 29 Cal. App. 3d 81, 87, 105 Cal. Rptr. 181, 184 (1972).

[59] People v. Herrera, 6 Cal. App. 3d 846, 852, 86 Cal. Rptr. 165, 168 (1970).

[60] 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (1974).

[61] *Id.* at 743, 113 Cal. Rptr. at 660.

[62] 42 Cal. App. 3d 414, 116 Cal. Rptr. 841 (1974). It crystallized it in the sense that

many was convicted of voluntary manslaughter on the theory that he aided and abetted a killing by giving the actual perpetrator a weapon. The appellate court affirmed the conviction, holding that aid given with knowledge of the principal's criminal purpose and criminal intent was sufficient to impose accomplice liability.[63]

The approach adopted by California is progressive and logical in its concentration on the wrongful acts of the aider and abettor and in his independent state of mind when committing those acts. On the other hand, the approach remains problematic because it bases the liability and punishment of the aider and abettor on the substantive crime committed by the principal wrongdoer.[64] The effect of this position is to hold the person liable as a principal if he aids and abets with knowledge that the principal intends to commit a crime. In essence, this approach establishes a different offense of aiding and abetting for proof purposes, but for punishment purposes it ignores the different offense. Although the proof requirements are based on the personal culpability of the aider and abettor, punishment is derivative in the sense that it is based upon the *principal's* wrongdoing.[65] The net effect of this approach is a very relaxed standard of proof for aiding and abetting with a very rigid and highly penal system of punishment.

II. Problems Involved in the Decision to Adopt Knowledge as the *Mens Rea* Requirement in Accomplice Liability

A. Knowledge: Definition and Proof

It is apparent that knowledge will play a significant role in any legislative reform in the area of accomplice liability; there-

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it clarified the kind of intent that must be proved: the intent requirement for accomplice liability in California refers to the aid given rather than the underlying offense.

[63] *Id.* at 420, 116 Cal. Rptr. at 845.

[64] *See, e.g., id.* at 419-20, 116 Cal. Rptr. at 844-45 (accomplice to murder and actual perpetrator both found guilty of voluntary manslaughter); People v. Standifer, 38 Cal. App. 3d at 744, 113 Cal. Rptr. at 661 (refusal of manslaughter instruction to aider and abettor inside house when principal killed victim outside).

[65] *See* R. Perkins, Criminal Law 656-68 (2d ed. 1969) (distinguishing between degrees of wrongdoing by the principal).

fore, it is appropriate to examine the problems involved in defining and proving knowledge. Initially, it should be recognized that knowledge is not a concept foreign to the criminal law, although it has at times been confused with intent. Knowledge in the law is not equated with its ordinary meaning because it usually is determined after the fact and by circumstantial evidence. The search for knowledge in the criminal law has been characterized aptly by Professor Perkins:

> For most practical purposes "knowledge" "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties. . . ." The need, therefore, is to search for the state of mind, or states of mind, which the courts have spoken of as "knowledge" for the purpose of a particular case.[66]

With this conception of knowledge in mind, Perkins devised a scheme of classifying legal knowledge based on past judicial decisions. The pertinent section of the scheme is: "(1) guilty knowledge [awareness of the fact as a result of personal observation], (2) guilty belief, [which is correct], (3) guilty avoidance of knowledge."[67]

Although Perkins defines "guilty knowledge" in his scheme as awareness of a fact as a result of personal observation, it should be understood that this is not proof of actual knowledge. This statement means that an inference can be drawn that a person had guilty knowledge of a fact because he observed that fact. It seems safe, however, to rule out "knowledge based upon personal observation" as a standard for accomplice liability because the very nature of this theory of liability requires that aid be given to a person who will commit a crime in the future.[68] If aid is given after the crime is committed, the aider is not considered an accomplice, rather, he is considered an accessory after

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[66] *Id.* at 775 (footnote omitted) (quoting State v. Ransberger, 106 Mo. 135, 17 S.W. 290, 292 (1891)).

[67] R. PERKINS, *supra* note 65, at 775.

[68] In endorsing this conclusion, one commentator distinguished between the type of knowledge which foresees future events that need not occur and the type which foresees future events that must occur given certain data. The latter, he contended, is inapplicable where one person tries to predict another's conduct. Comment, *A New Crime: Criminal Facilitation*, 18 LOY. L. REV. 103, 113-14 (1971-1972).

the fact or the harborer of a fugitive. Even if the principal informs his accomplice that he intends to commit a crime, the accomplice does not have actual knowledge that he will commit the crime, although he might have an actual belief.

A discussion of the law concerning the knowledge requirements for receiving stolen property provides some helpful insights into the problems involved in using the "belief which is correct" standard as the *mens rea* requirement for accomplice liability. Stolen property cases are particularly suited to the discussion because the theory of liability for receiving stolen property developed along the same lines as the theory of accomplice liability. Under both theories, the defendant's liability is based upon the actions of another party.[69] In accomplice liability cases, it must be determined whether the defendant had knowledge of the principal's future activities. In stolen property cases, it must be determined whether the defendant had knowledge of the principal's (seller's) past activities. The rule most often used to establish guilty knowledge in receiving stolen property cases is one requiring an actual belief that the property is stolen.[70] The mechanics of the "actual belief" test are described by LaFave and Scott:

> In most cases there is no direct testimony of the receiver's actual belief. Proof thereof must therefor be inferred from the circumstances surrounding his receipt of the stolen property. . . . The fact that he knowingly received other stolen property from the same (or even from another) thief at nearly the same time as the receipt of the stolen property in question is evidence from which it may be inferred that he had a guilty knowledge that the property in question was stolen.[71]

In determining how the above principles can be applied to situations involving accomplice liability, the following hypothetical example is helpful:

> The owner of a gun shop sells guns to anyone with money to

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[69] For a brief but informative historical discussion of the crime of receiving stolen property, see W. LaFave & A. Scott, *supra* note 1, at 682-83.

[70] *Id.* at 686.

[71] *Id.* at 686-87.

> buy them. He is aware that some of the guns he has sold have been used in the past to commit robberies. X comes into the shop and asks to purchase a gun. While in the shop and before the sale is completed, X mentions that he has a big job to pull that night. X is known to the shop owner as an ex-convict who does not work. The following day X is arrested for armed robbery. It is discovered that the weapon used in the robbery is the gun purchased the day before from the gun shop.

It would appear that under the receiving stolen property rules of proof, the evidence in this hypothetical situation merits an inference of knowledge on the part of the shop owner that X intended to use the gun to commit a crime. This is also an example of Perkins' "guilty belief which is correct" standard of knowledge.

One of the problems of determining knowledge under this approach is that if the judge is not careful in framing his instructions, he will permit the jury to convict a defendant under a purely objective test of liability.[72] This is not to say that the objective test—what an ordinary person would have believed—should not be considered by the jury, rather, it should not be the only consideration. In a criminal matter the very essence of the offense is the conscious and voluntary wrongdoing of the defendant.

It must be remembered, however, that negligence has been accepted in the criminal law as a basis of liability in some situations.[73] Therefore, negligence should be considered a possible standard for determining knowledge in accomplice liability. When negligence has been accepted, the punishment has been

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[72] Some states, however, including Mississippi, apply an objective test of knowledge. *E.g.*, McGlothlin v. State, 1 Md. App. 256, 229 A.2d 428, 431 (1967) (receiver knew or could reasonably have suspected property was stolen); Bennett v. State, 211 So. 2d 520, 526 (Miss. 1968) (would a reasonable man believe property was stolen).

This test has been criticized for failing to stress the distinctions between civil and criminal liability. In criminal cases, the defendant's intentional wrong is the essence of the crime. In civil cases, the defendant's failure to exercise ordinary care is tested, without any determination of intent or whether the defendant was a person of ordinary care. State v. Beale, 299 A.2d 921, 924 (Me. 1973).

[73] *E.g.*, GA. CODE ANN. § 26-1502 (1978) (recklessly damaging another's property by fire or explosives); MISS. CODE ANN. § 97-3-47 (1972) (killing resulting from culpable negligence is manslaughter).

reduced, thereby reflecting a lesser degree of culpability on the part of the actor. The leading argument for using negligence as a basis for criminal liability is that it serves as a deterrent against certain harmful acts by inducing careless persons to reflect before they act.[74] On the other hand, it has been argued that negligence is not a conscious state of mind reflecting voluntary action, and therefore it does not deserve criminal punishment.[75]

The compromise solution has been to employ a reduced penalty when gross negligence causes great harm.[76] It follows that if one of the purposes of making knowledge a basis for accomplice liability is to prevent crimes by depriving would-be criminals of necessary aid, negligence, under the rationale given for its use in the criminal law, would be a proper basis for determining accomplice liability. Since under the objective standard of liability a person whose conduct is merely negligent is held to possess the requisite knowledge for accomplice liability, this standard is appropriate only in situations where accomplice liability based on knowledge is considered a lesser offense than the offense aided, thereby reflecting the lesser degree of culpability involved.

"Guilty avoidance of knowledge" is a culpable state of mind that suffices for knowledge in the United States[77] and England.[78] Under English law, "guilty avoidance of knowledge" is denominated "connivance" or "willful blindness."[79] The first case applying this concept was *R. v. Sleep*.[80] The question in *Sleep* was whether an accused found in possession of naval stores *knew* that they were government stores. Although the accused was convicted by a jury, the conviction was later quashed because the jury did not find that the accused either knew the stores

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[74] MODEL PENAL CODE § 2.02, Comments, at 123, 129 (Tent. Draft No. 4, 1955).

[75] Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635-37 (1963).

[76] *See, e.g.*, MINN. STAT. § 169.11 (West 1960) (reckless driving causing another's death is manslaughter).

[77] *See generally* United States v. Jewell, 532 F.2d 697, 700-04 (9th Cir.) (discussing use in the United States), *cert. denied*, 426 U.S. 951 (1976).

[78] *See generally* Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298-306 (1954) (discussing use in England).

[79] *Id.* at 301.

[80] 169 Eng. Rep. 1296 (C.C.R. 1861), *discussed in* Edwards, *supra* note 78, at 298.

were government stores or willfully shut his eyes to the fact.[81] Later English cases using the rule held that licensees charged with allowing gaming in their places of business could be convicted, although they did not have knowledge of gaming, if they willfully abstained from knowing.[82]

In the United States, the cases employing the "avoidance of knowledge" concept have usually involved illegal drug activities. In most of these cases, defendants, who did not attempt to determine the contents of the packages that they were transporting, were charged with knowingly transporting drugs.[83] In *United States v. Jewell*,[84] the defendant was charged with knowingly possessing and bringing marijuana into the United States. The evidence indicated that the defendant knew that the car he drove had a secret compartment and knew facts indicating that it contained marijuana, but he deliberately avoided personal investigation.[85] The Ninth Circuit approved the trial court's use of an instruction allowing the jury to convict the defendant on an "avoidance of knowledge" theory.[86]

Another "avoidance of knowledge" case, *United States v. Dozier*,[87] is especially pertinent to this discussion because it involved accomplice liability. Appellant Dozier was convicted of aiding and abetting the possession of cocaine with intent to distribute. Dozier's actions were limited to driving undercover agents to a rendezvous and standing guard while her friend, the principal, actually made the sale in another room to one of the agents. The Second Circuit affirmed the conviction by approving instructions allowing the jury to convict the defendant if it found that she "had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the fact."[88]

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[81] 169 Eng. Rep. at 1302.

[82] Edwards, *supra* note 78, at 299-300.

[83] *See, e.g.*, United States v. Olivarez-Vega, 495 F.2d 827, 830 (2d Cir.) (unaware of cocaine in suitcase, but aware of suspicious circumstances), *cert. denied*, 419 U.S. 1020 (1974); United States v. Joly, 493 F.2d 672, 676 (2d Cir. 1974) (smuggled cocaine in brown paper bag concealed in belt).

[84] 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

[85] 532 F.2d at 699.

[86] *Id.* at 700.

[87] 522 F.2d 224 (2d. Cir.), *cert. denied*, 423 U.S. 1021 (1975).

[88] 522 F.2d at 226.

The court apparently was willing to base liability on a negligence or objective standard in narcotics cases. On a whole, however, the underlying theory of liability based on "guilty avoidance of knowledge" is a subjective one based on recklessness.[89] The defendant realizes that he is probably engaging in an illegal activity but refuses to investigate in order to avoid definite knowledge. It is reasonable to hold liable a person who realizes that his actions probably are illegal but consciously avoids finding out for sure. A danger does exist, however, when a person is held criminally liable on the "guilty avoidance of knowledge" theory on an objective basis, which was designed to deal with the reasonable prudent person in civil actions.[90] If a purely objective approach is used to determine accomplice liability under this theory, the accomplice should be punished less severely than the principal. On the other hand, if a subjective or recklessness approach is used, whereby a person is liable only if the jury finds that he deliberately avoided making certain of facts which are almost obvious, it could be the basis for full punishment.

After exploring the practical considerations involved in punishing knowing aid to one who intends to commit a crime, the next logical step is an examination of the normative questions involved in the decision whether to punish this type of conduct. Creating a separate crime to deal with those who aid and abet with knowledge alone would bring stability into a seemingly chaotic area of the law.

In the American system of criminal justice, however, one should not be punished because it is convenient to the system, but rather because a weighing of competing interests leads to the conclusion that one deserves punishment for voluntarily engaging in activities which are detrimental to organized society.

B. Reconciling Competing Interests in the Criminal Law

Liability in the Anglo-American system of criminal law is

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[89] *See* Edwards, *supra* note 78, at 298, 303-06 (connivance equated with recklessness).

[90] *See* Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A.2d 786, 789 (1958) (citing Gobrecht v. Beckwith, 82 N.H. 415, 420, 135 A. 20, 22 (1926) (voluntary ignorance is equivalent to negligence in tort cases)). *See generally* note 72 *supra*.

based on personal and individual guilt. Liability based upon accessorial conduct skirts the boundaries of criminal liability and is grounded in the idea of causal responsibility. Although the accomplice does not personally perform the illegal acts, he counsels, aids, abets or procures the illegal acts, which creates the assumption that he intends the commission of the crime. In the typical accomplice situation, all the prerequisites for criminal responsibility are met; there has been an act toward the completion of a crime—aiding and abetting—and intent has been established.[91] On the other hand, accomplice liability based on knowledge presents more difficulty. It can be argued that the moral distinction between intent and knowledge is so slight that no difference in punishment is justified. Such an argument has merit where the party being punished is the primary actor, since desire and awareness of probable consequences can be logically equated. For instance, since malice in common law murder prosecutions could be shown by proof of intent or knowledge, a person who pushed another off a bridge just to see the splash, knowing death was likely, was treated the same as the person who engaged in the same conduct with an intent to kill.[92] When a party's criminal responsibility is based upon the conduct of another, however, this desire that the principal accomplish a result is readily distinguishable from an awareness of the probable results of a course of conduct. When the aider desires the principal to commit a crime and lends his assistance to its commission, the primary actor can be seen as an agent of the accomplice. In the latter situation the attribution of responsibility is not aided by the presumption that a person intends the natural

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[91] *See generally* notes 15 through 39 and accompanying text *supra* discussing the purpose standard of accomplice liability in federal and state courts.

[92] The *mens rea* of murder is usually called "malice aforethought," a technical term for various mental attitudes which, if present, make a particular homicide heinous enough to constitute murder. Typically, an intention to kill or grievously injure or to do an act knowing that someone will probably be killed is sufficient. J. SMITH & B. HOGAN, CRIMINAL LAW 285-86 (4th ed. 1978). Such a piecemeal definition of homicide can, perhaps, be explained by the uniqueness of homicide as a crime. One commentator observed that killing historically has been viewed as "an assault on the sacred, natural order"; only execution of the slayer could expiate the sin. G. FLETCHER, RETHINKING CRIMINAL LAW 235-36 (1978). The same commentator also noted, however, that this view clashes with the modern concept of individualized justice. *Id.*

and probable consequences of his act. He does not have physical control over the primary actor's conduct,[93] and he does not engage in conduct that is inherently dangerous.

In determining the proper *mens rea* requirement for accomplice liability, it should be remembered that all criminal law is a compromise between two fundamental interests: the interest of society in its own security, and the interest of the individual in being free unless found legally blameworthy. Proponents of the "mere knowledge" standard for accomplice liability often cite the following language from *Backun v. United States*:[94]

> It must be remembered, however, that guilt as accessory before the fact has application only in cases of felony; and since it is elementary that every citizen is under moral obligation to prevent the commission of a felony, if possible, and has the legal right to use force to prevent its commission and to arrest the perpetrator without warrant, it is difficult to see why, in selling goods which he knows will make its perpetration possible with knowledge that they are to be used for that purpose, he is not aiding and abetting in its commission within any fair meaning of those terms.[95]

It is not enough to enact a statute making conduct criminal and to provide procedures for its application. In a system where individual liberty is stressed, procedures for the enforcement of criminal laws must be designed to work in a manner that will place minimum restraints on individual activities. The decision to make conduct unlawful first must be affirmatively justified and then the appropriate penalty must be determined.

The primary justification put forth by those who would punish conduct that knowingly aids and abets the commission of a crime is that of crime prevention.[96] This goal, however, must be weighed against competing interests to ensure that it does

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[93] One theory uses the degree of hegemony and control over the criminal act as the measurement of perpetration. An accessory does not have hegemony and control over the execution of the crime; that is retained by the perpetrator. G. FLETCHER, *supra* note 92, at 655-56.

[94] 112 F.2d 635 (4th Cir. 1940).

[95] *Id.* at 637.

[96] 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 153 (Study Draft, 1970) [hereinafter referred to as WORKING PAPERS].

not work a greater mischief than the harm it is designed to prevent. The method employed to prevent the outlawed conduct should be examined to determine if it can operate effectively. The primary competing interest to be considered in punishing knowing aid to those who plan to commit crimes is the protection of normally lawful activities.[97]

Initially, this discussion will focus on the preventive aspects of making knowledge a basis for accomplice liability. When prevention is sought, the principles of deterrence come into play. Although endless debate is possible over whether the criminal sanction can serve as a deterrent,[98] it seems to be an especially apt deterrent to the would-be accomplice or facilitator. The businessman about to rent a hotel room to a known prostitute will weigh the consequences of his action if he is aware that his conduct is illegal. Deciding that the rent money is less important than the risk of losing his freedom and community standing, the legitimate businessman may decide against renting the room. When the crime is to be committed by a third person, the usual strain and immediacy involved in decision-making is not present. This places the would-be accomplice in a better position to calculate deliberately the consequences of his actions.

The general deterrent aspects of punishing persons for knowingly aiding and abetting the commission of crimes has a dual nature. On one hand, those persons who know the conduct is outlawed and will result in criminal penalties will be reluctant to engage in those activities. In addition, when the potential criminal is refused aid necessary for the successful completion of his crime, there is a chance that he will abandon his plan or be arrested. This aspect of general deterrence might work in several ways. The potential aider might be an educative or moralizing force that causes the would-be offender to change his mind. In the last resort, if the potential criminal insists on going forward with his scheme, it will be reported, in some cases, by the person from whom aid is sought. If the potential criminal is unable to

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[97] *See* MODEL PENAL CODE § 2.04(3), Comment, at 30-32 (Tent. Draft No. 1, 1953) (should vendor forego sale where he knows of illegal purpose of would-be customer).

[98] *See* H. HART, PUNISHMENT AND RESPONSIBILITY 17-24 (1968) (discussing excuses for criminal activity).

obtain a gun immediately upon deciding to commit a robbery, he may never commit the robbery. If the potential aider is deterred from participating in a criminal scheme, he might also have reason to attempt to prevent the principal from committing the crime.

The above discussion tends to verify the belief that accomplice liability based on knowledge can serve as a measure of crime prevention. That, however, does not in itself justify the existence of such liability. The preventive effects must be weighed against other interests. As stated earlier, a primary concern is the possibility of placing undue restrictions on normally lawful activities, especially those of legitimate businessmen. The initial drafters of the Model Penal Code favored the interest of crime prevention over that of legitimate businessmen. The drafters viewed the situation from a very simplistic perspective: "[W]hen the only interest of the actor is his wish . . . to forego concern about the criminal purpose of others, though he knowingly facilitates in a substantial measure the achievement of such purposes, it is an interest that . . . is properly subordinated generally to the larger interest of [crime prevention]."[99] The decision, however, is not a simple one because of the potential restraints on lawful business activities. These restraints are likely to be in the form of erroneous decisions regarding unlawful use and, in many cases, a loss of business.[100] Even with these added considerations the scales remain tilted in favor of crime prevention, but realizing that these other interests are involved, preventive measures should be constructed in a manner that will accommodate them as much as possible. The New York faciliation statute[101] seems to be designed in a manner that provides maximum accommodation of the interests involved. The statute is applicable only to felonies, except when minors are involved. It requires probable belief that the actor's conduct will aid in

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[99] MODEL PENAL CODE § 2.04(3), Comment, at 32 (Tent. Draft No. 1, 1953). This view, however, was rejected by the American Law Institute in favor of a purpose standard. MODEL PENAL CODE § 2.06(3)(a), at 33 (Proposed Official Draft, 1962).

[100] R. PERKINS, *supra* note 65, at 664.

[101] N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980). For a more comprehensive discussion of New York's criminal facilitation statute, see notes 116 through 140 and accompanying text *infra*.

the commission of a crime, and that the aid provided the means and opportunity for the actual commission of a crime.[102] It further provides that a person cannot be convicted on the uncorroborated testimony of the perpetrator.[103] Most important, the statute punishes a facilitator less than it does a true accomplice.[104] A statute constructed in this manner seems more suited to protecting the interest of the legitimate businessman while promoting the vital social interest of crime prevention.

Finally, the problem of overextending the criminal law must be considered. Replacing the intent requirement with a knowledge requirement seems to weaken the justification for accomplice liability from a systematic viewpoint, because a system based on knowledge must address the important question whether society will impose criminal penalties on actions that are sometimes only negligent in nature. It should be noted that even at common law, when knowledge and recklessness sufficed as bases for criminal liability, they were usually labelled constructive or imputed intent. Some authorities have advocated doing away with this semantical justification and replacing it with a recognition that negligent acts aiding criminal conduct should be punished criminally. For example, Professor Fletcher has pointed out that:

> Once the normative status of *mens rea* comes into focus, the problem of negligence as a form of *mens rea* is tractable. . . . In the normal case of intentional conduct, where the actor is sane and his conduct is not excused by duress or necessity, it might be sufficient in establishing *mens rea* to show that the actor acted intentionally. But surely it does not follow that intentional conduct, or something like it, is a necessary condition for criminal culpability.[105]

If the inquiry focuses on the question of culpability, the

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[102] *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[103] *Id.* § 115.15 (McKinney 1975).

[104] An accomplice is criminally liable to the same degree as the person who actually committed the crime. *Id.* § 20.15. A facilitator is liable to a lesser degree than the person who actually committed the crime. *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[105] Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 414-15 (1971).

concern changes to the causal nature of the conduct rather than the actor's state of mind. A person who acts negligently deserves punishment because he should have considered the consequence of his conduct; he is punished so that he will be more careful. Therefore, it would seem that in some cases it is acceptable to punish unintentional conduct, but it should be punished less severely because the underlying crime was not willed. When the conduct is outlawed, those aspects of the criminal law designed to protect the individual's interest sometimes give way to the interest of general security. This is exemplified by legislation providing for strict liability, where intent is omitted as an element altogether.[106] Penalty provisions in strict liability statutes usually reflect a sacrifice in individual protection, but punishment is usually slight.[107] In our society, violent crime has reached such crisis proportions that requiring citizens to refrain from knowingly facilitating crime is justified even if it means a deviation from the notion of intent which is so deeply imbedded in the American concept of criminal law.

Once this recognition has been made, the problem of finding an appropriate penalty is presented. Professor H.L.A. Hart offers considerable wisdom in developing an answer to the problem:

> The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different

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[106] *See* Morisette v. United States, 342 U.S. 246, 250-63 (1951) (discussing strict liability criminal statutes); *see, e.g.*, MISS. CODE ANN. § 63-9-11 (1972) (violations of motor vehicle regulations). The resurgence of strict liability has occurred in connection with the penalty clauses of regulatory statutes in such fields as illegal liquor sales, sales of impure food and drugs, and traffic and motor vehicle regulations. R. PERKINS, *supra* note 65, at 802.

[107] *See, e.g.*, ALA. CODE § 20-1-5 (1977) (maximum fine of $500 or six months imprisonment for adulterated food and drugs); MISS. CODE ANN. § 97-27-1 (1972) (same); S.C. CODE § 56-1-440 (1977) (maximum fine of $100 or 30 days imprisonment for driving without a license). One commentator has argued that courts should not examine the intent of parties accused of petty violations because the penalties for violations are so slight the courts can disregard the protection of individual interests in favor of protecting social interests. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 69-70 (1933).

> types of offences: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law in contempt.[108]

There can be little debate that one who wills that a crime be committed is less blameworthy than one who actively and willfully commits that crime. Therefore, a distinction should be made between one who aids with intent equal to that of the principal and one who acts with knowledge but does not take the principal crime as his own because he desires only to provide the aid regardless of its use. It follows that crimes should be separated to reflect the degree of culpability of the defendants so that those charged with like crimes will be treated in a like manner. Criminal laws should offer guidelines to the public so that conduct can be adjusted to comply with the laws. For these reasons, conduct knowingly aiding criminal activity should be distinguished from conduct that intentionally aids criminal activity.

III. Proposed Compromise Approaches

From the above discussion, it is apparent that some uniform workable solution is necessary. The proposed solutions fall into two general categories: (1) the creation of two statutes, one to deal with knowledge-only situations and one to deal with purpose or intent siutations,[109] and (2) the adoption of a standard requiring only knowledge when there is substantial facilitation and requiring intent in other situations.[110]

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[108] H. Hart, *supra* note 98, at 25.

[109] *E.g.*, N.Y. Penal Law §§ 115.00-.15 (McKinney 1975 & Supp. 1980) (criminal facilitation statute). This is essentially the solution proposed by the National Commission on the Reform of Federal Criminal Laws. Working Papers, *supra* note 96, at 160-61.

[110] *See, e.g.*, Model Penal Code § 2.04(3)(b) (Tent. Draft No. 1, 1953).

Before discussing the proposed solutions, it should be noted that at least one source has suggested a third compromise solution. This suggestion is that "knowing aid should be deemed sufficient when the criminal scheme is serious in nature."[111] Under this approach, when the crime is a serious one, the need for crime prevention outweighs traditional considerations of personal culpability and personal wrongdoing in determining guilt.[112]

It must be recognized, however, that a conviction for a serious crime results in serious punishment; for this reason it is of paramount importance that guilt be based on personal culpability. As Professor Sayre recognized: "[I]t is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate, subconscious sense of justice of the man on the street is the only sure foundation of law."[113] When misdemeanors are involved, moral condemnation and punishment are greatly reduced—if present at all. It would be more in keeping with American concepts of justice to resolve the conflict between the concept of individual guilt and the interest of crime prevention in favor of the latter in misdemeanor situations rather than in felony situations. This has been the case with strict liability crimes where the purpose of the statute is regulatory and unrelated to questions of moral condemnation.

It should also be noted that different considerations apply to the crime of conspiracy than to accomplice liability. Conspiracy is a relational crime that has been deemed to present a great danger to society. Since society has decided that association for criminal purposes is a crime, which usually carries a penalty less than the underlying crime, it would seem that one who knowingly aids this group activity has associated himself with the

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[111] W. LaFave & A. Scott, *supra* note 1, at 509. People v. Lauria, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967), is cited as the source of this suggestion. The issue addressed in the case was what circumstances warranted imputing an intent to participate in a conspiracy to a supplier of services who knew that the services were being used for an unlawful purpose. 59 Cal. Rptr. at 631-32.

[112] *See* 59 Cal. Rptr. at 634-35.

[113] Sayre, *Criminal Responsibility for Acts of Another*, 43 Harv. L. Rev. 688, 717 (1930).

group. On the other hand, under the principles of accomplice liability, one is held fully liable for the conduct of another; therefore, his liability should be based on a different standard than that of a conspirator.[114] Finally, it should be pointed out that when serious crimes are involved, imposing accomplice liability based on aiding with knowledge is susceptible to the same problems and abuses discussed under the English and California approaches to accomplice liability.[115]

A. Creation of a Separate Facilitation Statute

New York is the only jurisdiction that has adopted a criminal facilitation statute.[116] The tenor of the facilitation concept is that assisting or encouraging a crime with knowledge is less culpable than assisting and encouraging a crime with specific intent. The argument is that because one who wills that a crime take place is not as culpable as one who seeks to make it take place, the former deserves less punishment than the latter. The commentaries to the original New York statute indicate that it is designed to deal with the following kinds of situations: "(1) [a] person sells a gun to a man who he knows intends to kill his wife, or (2) [a] telephone company provides telephone service to a person with knowledge that he intends to use it for bookmak-

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[114] The Model Penal Code's drafters advocate a unilateral approach to the conspiratorial relationship which defines conspiracy in terms of the conduct necessary to establish the liability of a particular actor rather than the liability of the group. MODEL PENAL CODE § 5.03, Comment, at 104 (Tent. Draft No. 10, 1960).

Because the Code minimizes the importance of criminal relationships, one critic has charged that it is inconsistent with the purposes of conspiracy laws—the breakup of criminal relationships before a more dangerous crime is committed. Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.F. 627, 628-29.

The crime of conspiracy, however, does provide some insights into the restructuring of accomplice liability because the proponents of the knowledge approach are concerned with preventing crime by depriving criminals of the means to commit crimes. The law should be structured in a manner that concentrates on the aider and abettor and the aid given, as in conspiracy where the law is designed to deal with group relationships. In this manner a separate crime can be formulated with its own punishment; this allows the law to be less concerned with the defendant's culpable state of mind, since it deals with the results of his acts and provides a less severe punishment.

[115] *See generally* notes 53 through 65 and accompanying text *supra*, discussing the English and California approach.

[116] N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980).

ing purposes, . . . or (4) [a] night watchman for a warehouse looks the other way when he see [*sic*] his burglar friend about to break into the warehouse."[117] The statute is apparently designed to cover the situation of the "legitimate" businessman as well as other situations where circumstances would indicate less culpability on the part of the facilitator. Although the facilitator is not considered an accomplice under the statute dealing with accomplice liability, facilitation is a lesser included offense of aiding and abetting.[118] This gives a jury an alternative when the defendant is charged as an accomplice, but the jury does not believe he deserves to be punished as a principal. It also provides the prosecutor with a tool in the plea bargaining process when dealing with a person who would otherwise be an accomplice.[119]

As originally formulated, the New York facilitation statute contained three major requirements or elements: (1) conduct which provides the means and opportunity for the commission of a crime; (2) actual commission of a crime by the person aided; and (3) a belief that it is probable that the aid is being rendered to one who intends to commit a crime.[120]

The drafters of the proposed federal code replaced the first of these elements with the requirement that the facilitator provide "substantial assistance," rather than "the means and opportunity," to the principal.[121] Although the whole purpose of formulating a standard is to provide jurors with some guidelines, the drafters admitted that the "substantial assistance" requirement is a vague standard.[122] Nevertheless, the drafters of the proposed federal code indicated that "substantial assistance" was preferred over "means and opportunity" because "substantial assistance" has been the standard used in federal courts.[123]

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[117] *Id.* § 115.00 Commentaries (McKinney 1975).

[118] *See* note 104 *supra.*

[119] *See* Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOKLYN L. REV. 257, 271 (1966) (facilitation statute allows prosecutor to charge accomplice as facilitator); Comment, *supra* note 68, at 114 (plea bargaining only value).

[120] N.Y. PENAL LAW §§ 115.00-.05 (McKinney 1975) (amended 1978).

[121] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 1002, at 68 (1971) (proposed criminal facilitation statute).

[122] WORKING PAPERS, *supra* note 96, at 161.

[123] *Id.*

This standard was adopted by federal courts because of their concern with finding sufficient involvement in the criminal scheme to merit an inference of intent.[124] On the other hand, courts utilizing a facilitation standard base liability merely on assistance given with knowledge of an unlawful purpose; therefore no inference of intent is necessary.[125]

Another argument advanced by the drafters of the proposed federal code to justify their selection was that the "substantial assistance" standard was necessary to make the crime of facilitation as broad as accomplice liability.[126] Since, however, the primary function of facilitation is to provide an alternative to accomplice liability, the statute should be structured to best serve that function, regardless of whether it is as broad as accomplice liability. In addition, if facilitation is intended to be a lesser included offense of accomplice liability, surely it need not be as broad.

A critical shortcoming of the "substantial assistance" standard is its failure to ensure that liability is based on personal guilt. Since criminal law in the United States is based upon a system of personal guilt, any deviation from that system must be based upon a relationship between facilitator and principal sufficiently substantial to withstand attack under the due process clause of the fifth amendment.[127] The doctrine of accessorial liability satisfies the concept of personal guilt because the aider and abettor has participated in the crime in one of three substantial ways: aiding, counseling, or procuring with the purpose of helping a scheme to succeed.[128] Aiders and abettors are, therefore, responsible for the acts which they assist the principal in performing.

On the other hand, the facilitator is held responsible for his

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[124] *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 711-12 (1943) (sale of illegal substances provides more direct substantial assistance than sale of legal substances when used to infer intent). *See generally* 53 COLUM. L. REV. 228, 239-41 (1953) (discussing use of substantial assistance test to show intent).

[125] *See* N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980) (no requirement of intent).

[126] WORKING PAPERS, *supra* note 96, at 161.

[127] *See* Scales v. United States, 367 U.S. 203, 224-25 (1961) (relationship to criminal activity must satisfy personal guilt concept to merit punishment).

[128] *See* note 2 *supra*.

own act of aiding, with liability being predicated upon the criminal use of the aid by the person aided.[129] Since the facilitator is being punished for his actions and not those of the principal, it is not necessary to search for a relationship between his actions and those of the principal to satisfy concepts of personal guilt. The question is basically one of causation, which in Anglo-American criminal law has been answered by a "cause in fact" test.[130] Under the facilitation statute, the inquiry into the causation issue is not for the purpose of imputing the primary harm to the facilitator, but a triggering mechanism for holding the facilitator liable for his own acts. In other words, until the facilitator's aid is put to an illegal use, he is guilty of no legal wrong, although he might be guilty of a moral wrong. The facilitation concept is derivative in the sense that the facilitator's actions are illegal only if they are used to commit another crime, but he is not liable for the actions of another. It follows that, since it is unnecessary to connect the facilitator's aid to the principal's act in order to establish personal guilt, there is no need to determine whether the aid was substantial if it provided the means and opportunity.

The second element of the New York facilitation statute provides that the conduct must in fact aid another person in the commission of a crime.[131] Under the original statute, the crime committed had to be a felony.[132] This reflected the view also held by the drafters of the proposed revision of the federal criminal code:

> [L]iability for aiding a misdemeanor should be based on complicity [accomplice liability] or not at all. . . . Moreover, in practice it is likely that facilitators will be charged as accomplices, but the facilitation offense will be available for conviction of the lesser offense in borderline cases. No such need is seen for misdemeanors.[133]

In 1978, the New York facilitation statute was amended to

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[129] N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980).
[130] G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 328 (1978).
[131] N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980).
[132] *Id.* §§ 115.00-.05 (McKinney 1975) (amended 1978).
[133] WORKING PAPERS, *supra* note 96, at 161.

create four degrees of facilitation.[134] One new degree was added to cover conduct which provides the "means and opportunity" for a person under the age of sixteen to commit a crime. Thus, culpability for criminal facilitation is now based upon the status of the principal as well as the seriousness of the offense committed.[135] These changes may reflect a growing concern with the problem of juvenile crime in the state and a concern for sexual abuse of juveniles nationwide. It is reasonable to hold a person who sells a gun to a juvenile to a higher degree of liability than one who sells a gun to an adult, or to punish a hotel manager who provides a room to a child for prostitution while ignoring the manager who does the same for an adult.

The third and final element, which has been the subject of much litigation, requires that the defendant believe that the person aided intends to commit a crime.[136] A 1972 decision construing this provision held that "[n]o 'intent' by the facilitator to commit the prospective crime is required; the *mens rea* consists of a belief on his part that he is probably 'rendering aid' to the prospective perpetrator."[137] This interpretation indicates that the courts understand that the statute supplements the accomplice statute in order to deal with situations where intent is absent.

The most interesting and instructive case construing the facilitation statute was the 1973 case of *People v. Gordon*.[138] In *Gordon*, the defendant met an undercover police officer at a restaurant where he learned that the officer was interested in buy-

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[134] N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980).

[135] The new provision makes misdemeanor facilitation a crime when juveniles commit the underlying crime and the facilitator is over 18 years of age. When the facilitator is over 18, and he provides the opportunity for a person under 16 to commit a felony, he is guilty of a class E felony if he believed it probable that the person under 16 intended to commit a felony; the same conduct will result in the commission of a class B felony and the charge of first degree facilitation when the person under 16 commits a class A felony. *Id.* The conduct included under the original first degree statute, *id.* § 115.00 (McKinney 1975) (amended 1978), is now included in the second degree statute, but the punishment remains the same, *id.* § 115.05 (McKinney Supp. 1980).

[136] *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[137] People v. Harrison, 71 Misc. 2d 782, 337 N.Y.S.2d 13, 15 (Sup. Ct. 1972) (citation omitted); *accord*, People v. Chester, 71 A.D.2d 792, 418 N.Y.S.2d 962, 966 (1979) (facilitator's belief that he was probably aiding in crime sufficient).

[138] 32 N.Y.2d 62, 295 N.E.2d 777, 343 N.Y.S.2d 103 (1972).

ing some marijuana. The defendant gave the officer the name, address, and directions to the home of a person who subsequently sold the officer some marijuana. The defendant's conviction was reversed because it was impossible for the defendant to have had any belief that the seller had a criminal intent, because it was nonexistent at the time of the facilitation itself.[139] This case illustrates several points, not the least of which is that the perpetrator must have formed the intent to commit the crime at the time the aid is rendered. It also seems to indicate that the facilitator must have had some contact with the perpetrator before he can be convicted, and the evidence must indicate that the facilitator's conduct aided the person whose conduct he is charged with facilitating. In this case, he facilitated a purchase, but he was charged with facilitating a sale.[140] The points mentioned above are important because the facilitation statute is not intended to be invoked against acts which are innocent when performed, but which are later used for illegal purposes.

B. Complicity Under the Proposed Federal Code

The National Commission on Reform of Federal Criminal Laws has proposed a modified version of the New York facilitation statute.[141] Accepting this recommendation, the proposed Criminal Code Reform Act of 1979 includes a criminal facilitation provision providing for criminal liability based on the conduct of another person if one knowingly facilitates the commission of the offense by providing assistance that is in fact substantial.[142] While the inclusion of this provision would be an improvement compared with the current state of accomplice law, the use of the substantial assistance standard fails to ensure that

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[139] *Id.* at 64-66, 295 N.E.2d at 778-79, 343 N.Y.S.2d at 104-05.

[140] Newton could not be convicted of facilitating the officer's possession because possession was a misdemeanor. *Id.* at 65, 295 N.E.2d at 779, 343 N.Y.S.2d at 105-06. The 1978 amendment to New York's criminal facilitation statute allows a person to be charged with misdemeanor facilitation only if the principal is under 16. N.Y. PENAL LAW § 115.00(2) (McKinney Supp. 1980).

[141] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 1002, at 68 (1971).

[142] S. 1722, 96th Cong., 1st Sess. § 401(b) (1979). *See generally* SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., REPORT ON CRIMINAL CODE REFORM ACT OF 1979, at 75-78 (1980) (discussing reasons for inclusion of facilitation provision).

liability will be based on personal guilt[143] and also fails to provide a definite standard, leaving the courts with the task of defining substantial assistance on a case by case basis.[144] A better standard would be provided by the phrase "means and opportunity" used in the New York facilitation statute.[145]

[143] *See* notes 127 through 130 and accompanying text *supra*.
[144] *See* note 122 and accompanying text *supra*.
[145] N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980).

THE DECLINE AND NEAR FALL OF STATUTORY SEXISM IN MISSISSIPPI

*M. Carolyn Ellis**

Until the mid-1960's discrimination on the basis of sex was not viewed as a particular legal or societal issue.[1] With the congressional enactment of both the Equal Pay Act of 1963[2] and Title VII of the Civil Rights Act of 1964,[3] and the United States

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[1] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) (affirming Illinois' refusal to admit women into law practice). Mr. Justice Bradley's concurrence epitomized society's thinking about women:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141. *Cf.* State v. Hall, 187 So. 2d 861, 863 (Miss.) (upholding exclusion of women from juries), *appeal dismissed,* 385 U.S. 98 (1966) (per curiam). The Mississippi Supreme Court stated:

> The legislature has the right to exclude women [from the jury] so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.

187 So. 2d at 863.

[2] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976), an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1976), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

[3] The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976) provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or

Supreme Court's landmark decision in *Reed v. Reed*,[4] however, national attention began to focus on the problems of gender discrimination. Unfortunately, public concern over sex discrimination in Mississippi has, until recently, been slight. In the late 1970's such discrimination still permeated the state constitution,[5] the Mississippi Code,[6] and case law.[7] However, in the past few years, and particularly during the 1980 and 1981 legislative sessions, Mississippi has moved more quickly toward eradication of sex discriminatory laws. A substantial amount of the impetus has come from the decisions of the United States Supreme Court[8] and, to a lesser extent, from a 1979 decision of the Mis-

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refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The 1964 Act was intended to protect blacks and other minorities from employment discrimination. In an attempt to gain allies for the Southern faction, the Act was amended on the day before it was passed to include the word "sex." Although it was generally thought that inclusion of sex discrimination would arouse opposition to the Act from the "liberal" element of Congress, this did not prove to be true. As a result of this last minute amendment, there is virtually no legislative history on sex discrimination and Title VII. *See* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 103-06 (1969) (describing the peculiar history of Title VII). *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 879-85 (1967) (discussion of the legislative history of the Act).

[4] 404 U.S. 71, 74 (1971) (invalidating a state statute as a denial of equal protection to women under the fourteenth amendment). *See* note 11 *infra*.

[5] *E.g.*, MISS. CONST. art. 9, § 214, subjects only men to military duty; MISS. CONST. art. 4, § 106 (1890) (amended 1978), formerly provided that only women were eligible for the position of State Librarian.

[6] *See, e.g.*, MISS. CODE ANN. § 21-29-145 (1972) (amended 1978) (death benefits); *id.* § 71-3-25 (amended 1979) (same); *id.* § 93-1-5 (marriage license requirements); *id.* § 97-3-71 (assault with intent to ravish).

[7] *See* Green v. State, 270 So. 2d 695, 697 (Miss. 1972) (only men liable for voyeurism); State v. Hall, 187 So. 2d 861, 863 (Miss.) (upholding exclusion of women from juries), *appeal dismissed*, 385 U.S. 98 (1966) (per curiam).

[8] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 271 (1979) (invalidated Alabama's alimony statute which granted alimony to wives only); Stanton v. Stanton, 421 U.S. 7, 17 (1975) (invalidating statutory differences in age of majority for males and females with regard to parent's obligation for child support payments); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (invalidated an Air Force regulation that accorded different treatment

sissippi Supreme Court.[9]

This article concentrates on some of the major discriminatory Mississippi statutes and examines the recent changes made by the legislature, the legal necessity for those changes, and the status of women in Mississippi after the recent flurry of legislative activity. Because of the number of gender-based statutes in Mississippi, the article focuses primarily on the woman in two emergent roles—first, the woman as worker and economic being and, second, the woman as criminal.[10]

Although the standard of review in sex discrimination cases varied during the early 1970's,[11] the United States Supreme Court appears finally to have fashioned a concrete test. This new test lies between the traditional rational relation test[12] and the strict scrutiny test which is usually applied in cases of discrimination based on race, religion, or national origin.[13] The Supreme

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to the sexes solely for administrative convenience).

[9] *See* Tatro v. State, 372 So. 2d 283, 285 (Miss. 1979) (anti-fondling statute, which punished only males, violated equal protection clause). The legislature promptly corrected the inherent constitutional defect in MISS. CODE ANN. § 97-5-23 (1972) (amended 1980). *See also* notes 192 through 206 and accompanying text *infra*.

[10] *See generally* F. ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL 15-20 (1975) (percentage of women who commit crimes has increased significantly).

[11] *Compare* Reed v. Reed, 404 U.S. 71, 76 (1971) (Court applied what seemed to be an intermediate level of review to invalidate Idaho's sex discriminatory statute governing issuance of letters of administration) *with* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality of the Court indicated sex-based distinctions were suspect classification and applied standards reminiscent of the strict scrutiny test) *and* Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (Court retreated from strict scrutiny test used in *Frontiero* and apparently used rational relation test).

[12] The traditional rational relation test is generally satisfied if the classification itself is a rational one, the classification furthers a proper governmental purpose, and all persons within the class are treated equally. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (holding that a New York statute regulating advertising on vehicles was rationally related to its intended purpose); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (classification having some reasonable basis does not violate equal protection clause). In the sex discrimination area the rational relation test was used consistently prior to the *Reed* decision, always upholding the challenged statute. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948) (Court applied rational relation test to uphold statute prohibiting most women from bartending).

[13] The strict scrutiny test, which requires that a compelling state interest exist, almost invariably results in invalidation of the disputed statute. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964) (strict scrutiny applied to invalidate Florida statute subjecting only interracial unmarried couples to criminal liability for cohabitation); Hernandez v. Texas, 347 U.S. 475, 477, 482 (1954) (strict scrutiny employed to overturn

Court has not yet labeled this new standard, but it will be referred to in this article as the "substantial relationship" test.[14] This article will examine the Mississippi statutes in light of that test.

I. Statutory Economic Discrimination

A. Marriage Restrictions

Women, like minorities, often encounter discrimination because of cultural biases. The Mississippi statute governing the issuance of marriage licenses[15] illustrates the sex stereotyping that hinders women's opportunities to gain skills necessary for employment. For example, the Mississippi statute provides that a female need only be fifteen years of age to marry without the consent of her parents, whereas a male must be seventeen years of age. Two factors are often cited to justify such a distinction: (1) females mature psychologically and emotionally at an earlier

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murder conviction where Mexican-Americans were systematically excluded from jury service).

[14] Although the Court typically does not label its standards of review, commentators have attempted to denominate the Court's tests when analyzing them. *See* Gunther, *The Supreme Court, 1971 Term—Forward: "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,"* 86 Harv. L. Rev. 1, 21 (1972) (labeling the middle-tier test "rational scrutiny"). The most frequently cited case employing this test is Craig v. Boren, 429 U.S. 190, 197, 199 (1976) (invalidating gender-based distinctions in legal drinking age). In discussing the middle-tier test, the *Craig* Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. This test also has been employed in cases involving the rights of illegitimates. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 766-67, 769 (1977) (statute must bear a substantial relationship to a legitimate state purpose). *But cf.* Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (Immigration and Nationality Act, excluding the relationship between an illegitimate child and natural father from preference, held constitutional; responsibility of Congress to change discriminatory law).

[15] Miss. Code Ann. § 93-1-5(d) (1972) states in pertinent part:

> The clerk shall not issue a marriage license under the provisions of this section unless the male applicant is at least seventeen (17) years of age, and the female is at least fifteen (15) years of age, provided, however, that if . . . sufficient reasons exist . . . and that the parents or other person in loco parentis of the person or persons so under age consent thereto, then the judge . . . may waive the minimum age requirement . . . .

Subsection (a) provides that an application for a marriage license must be filed in the female applicant's county of residence if she is a Mississippi resident under the age of 21. There is no similar provision for male applicants under the same age.

age than males, and (2) males need additional time to prepare themselves for a lifetime of work.[16] The latter reason is rooted in the traditional view that men have the obligation to support the family, thus they need additional time to acquire necessary employment skills through either education or training.[17] Men have long been viewed as having two worlds—family and work, whereas women have generally had only one—family.[18]

Although these stereotypes may have a historical basis they are not valid in the 1980's. Today, fifty percent of all women are in the labor force[19] and ninety-one percent have been or will be in the labor force during their lives.[20] Several reasons account for this increase. The rising divorce rate,[21] coupled with the fact that more women remain single longer,[22] has caused an increase in the number of employed women. Furthermore, faced with rising inflation, many married women have joined the labor force in an effort to maintain their families' standard of living.[23]

In the early 1970's, at least one state court determined that a marriage statute similar to that of Mississippi was unconstitutional. In *Berger v. Adornato,*[24] a New York trial court held that gender-based age distinctions with regard to parental consent

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[16] *Cf.* Stanton v. Stanton, 421 U.S. 7, 10, 14 (1974) (Court discussed these distinctions, but rejected them as a basis for statutory differences in ages of majority for males and females with regard to parent's obligation for child support payments).

[17] *See* Stanton v. Stanton, 30 Utah 2d 315, 319, 517 P.2d 1010, 1012 (1979).

[18] *See* E. Carey & K. Peratis, Woman and the Law 145-76 (1979) (history of sex-based differentials in marriage law).

[19] U.S. Dep't of Labor, Employment and Training Report of the President 13 (1979) (statistics for the fourth quarter of 1978); *cf.* U.S. Dep't of Labor, Geographic Profile of Employment and Unemployment 12 (1979) (1978 rate of employment in Mississippi was 47.1% for women over age 16 and 47.8% for women over age 20).

[20] U.S. Dep't of State, American Women Today and Tomorrow 18 (1977) (National Commission on the Observance of International Women's Year, 1975, B. Bryant, author).

[21] *See* U.S. Dep't of Labor, Employment and Training Report of the President 100 (1979) (77.6% of the 2.8 million divorced women heading families were employed in 1978).

[22] *See id.* (of the 1.3 million American women never married, 55.8% were employed in 1978).

[23] *See id.* at 99.

[24] 76 Misc. 2d 122, 350 N.Y.S.2d 520, 524 (Sup. Ct. 1973) (statute requiring parental consent for marriage of male under age 21 and female under age 18 was arbitrary and violated equal protection clause).

for marriage violated equal protection principles. The New York legislature subsequently modified the statute to provide that either sex upon reaching age eighteen could marry without parental consent.[25]

A few years later the United States Supreme Court, in *Stanton v. Stanton*,[26] addressed the constitutionality of Utah's general emancipation statute,[27] which provided that females reached the age of majority at age eighteen while males attained majority age at twenty-one. In *Stanton*, a divorced father, under court order to provide child support for his son and daughter, ceased child support payments to his daughter when she reached the age of eighteen.[28] In an opinion by Justice Blackmun, the United States Supreme Court held by an eight-to-one vote that the Utah statute violated the equal protection clause of the fourteenth amendment. In so holding, Blackmun eloquently recognized significant societal changes:

> [W]e perceive nothing rational in the distinction drawn by § 15-2-1 which, when related to the divorce decree, results in the appellee's liability for support for Sherri only to age 18 and for Rick to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be

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[25] N.Y. DOM. REL. LAW § 15(2) (McKinney 1977).

[26] 421 U.S. 7 (1975); *see* note 16 *supra*.

[27] 421 U.S. at 13-17; UTAH CODE ANN. § 15-2-1 (1953) (amended 1975). Conversely, Mississippi's general emancipation statute, MISS. CODE ANN. § 1-3-27 (1972) defines "minor" as "any person, male or female, under twenty-one years of age."

[28] 421 U.S. at 8-9.

> expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance. . . .[29]

Assuming arguendo that the age distinction based on sex could ever have been related to a governmental interest, Justice Blackmun's decision made clear that such a nexus no longer exists. The contested statute in *Stanton* could not withstand challenge under even the lower rational relationship standard.[30] Therefore, it was unnecessary for the Court to determine whether the statute could withstand the higher standard of *Craig v. Boren*.[31]

Under the *Stanton* criteria, it would be difficult, if not impossible, to justify constitutionally the age provisions of the Mississippi marriage license statute. Using even the less stringent standard, a court should conclude that the statute is constitutionally impaired. Inexplicably, a corrective bill introduced during the 1980 legislative session did not get out of its legislative committee.[32] The bill was not reintroduced in the 1981 legislative session.

B. Prohibition Against Enticement into Employment

Only one other Mississippi statute embodied a similar age distinction. The statute prohibited enticing either females under the age of eighteen or males under the age of twenty-one into employment without parental consent.[33] This statute was liter-

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[29] *Id.* at 14-15.

[30] *See* note 12 *supra*.

[31] *See* note 14 *supra*.

[32] S. 2127, 1980 Miss. Leg., Reg. Sess., introduced by Sen. Ellis Bodron, did not pass the Senate Judiciary Committee. It would have amended MISS. CODE ANN. § 93-1-5 (1972) to provide that both males and females had to attain 17 years of age before a marriage license could be issued without parental consent.

[33] MISS. CODE ANN. § 97-5-7 (1972) (amended 1980) prior to the 1980 amendment provided:

> Any person who shall persuade, entice, or decoy away from its father or mother, with whom it resides, any child under the age of twenty-one years if a male, or eighteen if a female, being unmarried, for the purpose of employing

ally a holdover from the child labor laws of the 19th century.[34] The 1980 state legislature rectified the inherent unconstitutionality of the enticement statute by lowering the age of protection for males from twenty-one years to eighteen years of age.[35]

C. *Protective Labor Laws*

1. Historical Background

Despite the cultural bias against women workers manifested in statutes prohibiting the enticement of women into employment and by marriage licensing provisions,[36] women began to enter the labor force in large numbers after the Civil War.[37] Initially, they faced horrendous working conditions and below-subsistence wage levels.[38] These conditions fostered the organization of social reform groups including the National Consumers League, the General Federation of Women's Clubs, and the National Women's Trade Union League.[39] These groups success-

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such child without the consent of its parents, or one of them, shall . . . be . . . fine[d] . . . or imprisoned . . . or both.

[34] The forerunner of MISS. CODE ANN. § 97-5-7 (1972) (amended 1980) was MISS. REV. CODE § 2755 (1880).

[35] Act of April 23, 1980, ch. 357, 1980 Miss. Laws 645 (codified at MISS. CODE ANN. § 97-5-7 (Supp. 1980)).

[36] *See* notes 15 through 35 and accompanying text *supra*.

[37] The employment of women in manufacturing, for instance, increased from 270,897 in 1860 to 323,770 in 1870. By 1900 over 1,029,296 women, 19.4% of the total work force, held manufacturing jobs. U.S. CENSUS OFFICE, DEP'T OF INTERIOR, EIGHTH CENSUS OF THE UNITED STATES 742 (1865); U.S. DEP'T OF INTERIOR, TWELFTH CENSUS OF THE UNITED STATES at CXXVI, table XIII A (1902). One historian has suggested that the depletion of the labor force caused by Civil War casualties forced women into the labor force. E. FLEXNER, CENTURY OF STRUGGLE 134 (rev. ed. 1975).

[38] The National Consumers League protested $2.00 weekly wages; 7:45 a.m. to 12:00 a.m. work schedules; and lack of work seats, lockers, vacations, and lunchrooms. E. FLEXNER, *supra* note 37, at 213 (citing M. NATHAN, THE STORY OF AN EPOCH-MAKING MOVEMENT 1-14 (1926)). For a comprehensive treatment of women's working conditions in turn-of-the century America, see U.S. DEP'T OF COMMERCE AND LABOR, REPORT ON THE CONDITION OF WOMEN AND CHILD WAGE EARNERS IN THE UNITED STATES, S. DOC. NO. 645, 61st Cong., 2d Sess. (1912) (19 volumes).

[39] The National Women's Trade Union organized women for membership in existing unions and assisted unions which already had women members. The General Federation of Women's Clubs was a major force behind the government's investigation of labor conditions cited in note 38 *supra*. The National Consumers League urged consumers to pressure employers into improving working conditions. The purposes and efforts of these organizations are described in more detail in B. BABCOCK, A. FREEDMAN, E. NORTON & S.

fully lobbied for the passage of state "protective" labor laws.[40]

The United States Supreme Court addressed the constitutionality of this type of law in *Muller v. Oregon,*[41] a 1908 case. There the Court upheld the constitutionality of an Oregon statute that prohibited employers from employing women for longer than ten hours per day.[42] *Muller* was decided during the heyday of the substantive due process analysis[43]; only three years earlier, in *Lochner v. New York,*[44] the Court had struck down a New York law limiting male and female bakery workers to ten hour work days and sixty hour work weeks.[45] Relying on a brief submitted by Louis Brandeis prior to his appointment to the Court, the Court distinguished *Lochner,* basing its reasoning on the inherent "difference in the sexes."[46] Fueled by *Muller,* states accelerated the passage of protective labor laws. By 1917, thirty-eight states had enacted some type of protective legislation.[47] However, this legislation hampered resolution of many of the employment problems faced by women. Some women's organizations pointed out that since men could be paid less, could work for longer hours, and could be employed at night, employers often preferred men over women employees.[48] In recognition of these facts, these groups advocated the repeal of some protective laws and the extension of others to cover all workers, not just women.[49] The more traditionally minded reform organizations opposed these changes, basing their position on concepts similar

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Ross, Sex Discrimination and the Law 26-28 (1973) [hereinafter cited as B. Babcock].

[40] *Id.* at 247.

[41] 208 U.S. 412 (1908).

[42] *Id.* at 416-17 (describing provisions of the statute).

[43] For a review of Supreme Court cases applying substantive due process analysis to labor laws, see The Constitution of the United States of America 1310-32 (L. Jayson super. ed. 1973).

[44] 198 U.S. 45 (1905).

[45] *Id.* at 63.

[46] The Court reasoned that since "history discloses the fact that woman has always been dependent upon man" then "she is properly placed in a class by herself" for purposes of protective legislation. 208 U.S. at 421-22.

[47] B. Babcock, *supra* note 39, at 247.

[48] U. O'Neill, Every One Was Brave 241-42 (1969).

[49] B. Babcock, *supra* note 39, at 248-49 (citing A. Hill, Protective Labor Legislation for Women: Its Origin and Effect (1970) (unpublished paper, Yale Law School)).

to those endorsed by the Supreme Court in *Muller*.[50] However, the advocates of equality finally found in Title VII of the Civil Rights Act of 1964 the embodiment of their philosophy.[51]

2. Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination on the basis of race, sex, creed, or national origin.[52] Title VII authorizes the Equal Employment Opportunity Commission (EEOC) to promulgate regulations to implement the provisions of the Act.[53] Since Title VII preempts conflicting state laws,[54] many "protective" labor laws that prohibit the employment of women at night or in certain jobs or areas, establish weight-load requirements, and restrict the number of work hours or days are vulnerable to legal attack.[55] Rather than declare all such laws void, the EEOC in some cases has declared that employers may not use these laws as a defense for failing to provide similar protections to its male workers.[56]

The leading case striking down a state "protective law" is *Rosenfeld v. Southern Pacific Co.*[57] Rosenfeld alleged that a male employee was awarded the position of agent-telegrapher

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[50] B. BABCOCK, *supra* note 39, at 250-61 (describing the growth of the disagreement between groups interested in the plight of working women and the impact of World Wars I and II, the Depression, and other events affecting the women's movement and women's labor market status).

[51] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1976 & Supp. II 1978)). It was amended by the Equal Employment Opportunity Act of 1972, increasing the enforcement powers of the Equal Employment Opportunity Commission. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-16 (1976 & Supp. II 1978)).

[52] 42 U.S.C. § 2000e-2 (1976).

[53] *Id.* § 2000e-12(a).

[54] Title VII provides that state laws must be followed unless they "require or permit the doing of an act which would be an unlawful employment practice under this subchapter." *Id.* § 2000e-7.

[55] Federal regulations promulgated to implement Title VII state that laws which "prohibit or limit the employment of females" in certain occupations or to certain hours discriminate against women in violation of the Act because they "do not take into account the capacities, preferences and abilities of individual females." 29 C.F.R. § 1604.2(b)(1) (1979).

[56] *E.g.*, 29 C.F.R. § 1604.2(3)(ii) (1979) (minimum wage laws for women).

[57] 444 F.2d 1219 (9th Cir. 1971).

despite plaintiff's job seniority.[58] As one of its defenses, Southern Pacific argued that it was unable to give Rosenfeld the position because to do so would violate a California labor law which limited women's work hours and restricted the weight-loads women could carry.[59] California intervened to defend its law.[60] However, the court rejected both parties' arguments and held that Title VII preempted the state law in question.[61] The court reasoned that EEOC regulations implicitly demonstrated that "state labor laws inconsistent with the general objectives of [Title VII] must be disregarded."[62]

Title VII's prohibitions soon spawned further litigation. *Rosenfeld* was followed by *Richards v. Griffith Rubber Mills*,[63] a district court case. Using the supremacy clause, the *Richards* court invalidated an order of the Oregon State Wage and Hour Commission which restricted the number of pounds a female employee could lift.[64] A myriad of later cases likewise invalidated the restrictive laws of other jurisdictions.[65]

Many employers reply to a sex discrimination bill of complaint by including in their answer the bona fide occupational qualification [BFOQ] defense.[66] The statute provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . .

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[58] *Id.* at 1220.

[59] *Id.* at 1223.

[60] *Id.* at 1220.

[61] *Id.* at 1227.

[62] *Id.* at 1226. The court noted that the Supreme Court had declared that "the administrative interpretation of the Act by the enforcing agency 'is entitled to great deference [*sic*].' " *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)).

[63] 300 F. Supp. 338 (D. Or. 1969).

[64] *Id.* at 340.

[65] *E.g.*, Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096 (S.D. Ohio 1971) (invalidation of Ohio's hours and weight restriction statutes), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972); Garneau v. Raytheon Co., 323 F. Supp. 391, 394-95 (D. Mass. 1971) (invalidation of Massachusetts' maximum hours statute); Local 246, Util. Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1267 (C.D. Cal. 1970) (invalidation of California's weight restriction statute); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1307-08 (S.D. Ill. 1970) (invalidation of Illinois' hours and weight restriction laws).

[66] *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1223 (9th Cir. 1971) (defendant railroad company defended in part on BFOQ exception). *See generally* notes 57 through 62 and accompanying text *supra*.

> religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[67]

As demonstrated by the EEOC guidelines, the BFOQ exception should be narrowly construed in cases involving sex discrimination.[68]

Weeks v. Southern Bell Telephone & Telegraph Co.[69] is the leading case concerning statutory restrictions on women employees under a BFOQ rationale. The defendant telephone company in *Weeks* complied with a Georgia state regulation which limited the weight-load of a woman employee to thirty pounds.[70] The Fifth Circuit Court of Appeals concluded that Congress intended the BFOQ defense to be construed narrowly. Therefore, the court held that the telephone company failed to meet the heavy burden of proof which confronts an employer who relies on a state's restrictive law as a BFOQ defense.[71]

Other cases have focused specifically on statutes which limit the employment roles of women. In *Jordan v. Wright*,[72] the court held that wholesale exclusion of women from the work of "police patrolmen" was not based on a BFOQ.[73] The Montgomery, Alabama police department maintained one job classification termed "police-woman," which encompassed duties "best performed by a woman . . . ."[74] When the female plaintiffs sought positions as general "police patrolmen," their applications were denied. At least one applicant was told that such po-

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[67] 42 U.S.C. § 2000e-2(e)(1) (1976). An employer may restrict employment opportunities, for instance, in hiring actors or religion teachers. *Id.* § 2000e-2(e)(2); 29 C.F.R. § 1604.2(a)(2) (1979). Note that the BFOQ is not a defense to racial discrimination.

[68] 29 C.F.R. § 1604.2(a) (1979). The regulations provide further that state laws which prohibit or limit the employment of females, for example, in certain occupations or during certain hours, "will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." *Id.* § 1604.2(b)(1).

[69] 408 F.2d 228 (5th Cir. 1969).

[70] *Id.* at 232-33.

[71] *Id.* at 232.

[72] 417 F. Supp. 42 (M.D. Ala. 1976) (mem.).

[73] *Id.* at 45.

[74] *Id.* at 44 (citing City of Montgomery Police Department Manual of Rules and Regulations § 136, "General Duties of Policewomen").

lice work was "too dangerous for women and that . . . Montgomery was not yet ready for women on patrol."[75] Evidence established that the defendant police department did not evaluate the women's individual qualifications for general police work.[76] The court held for the plaintiffs, stating that "the defendants have not seriously attempted to demonstrate that sex is a 'bona fide occupational qualification' for the job responsibilities included in the classification of police patrolman. . . . Defendants . . . introduced no evidence . . . that women are unable to perform safely and efficiently the duties of an officer engaged in general police work, including patrol."[77]

Similarly, in *United States v. City of Chicago*,[78] the Court of Appeals for the Seventh Circuit upheld a sex discrimination claim against the Chicago police department.[79] Evidence established that women in the department were usually assigned limited duties relating either to the processing and custody of female prisoners or to juvenile offenders.[80] The court held that such practices "could be justified only by proof that sex is a bona fide occupational qualification of those positions from which women have been excluded."[81] The court, commenting that the city of Chicago had not attempted to prove that women could not perform full police duties,[82] remanded the case to the district court on the equal protection issues raised by the plaintiffs.[83]

Since Title VII is applicable only to employers with a minimum of fifteen employees,[84] many states have enlarged the protected class by passing either state anti-discrimination laws or amendments to their state fair employment acts to cover those employers not within the purview of Title VII.[85] By prohibiting

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[75] 417 F. Supp. at 44.
[76] *Id.* at 44-45.
[77] *Id.* at 45.
[78] 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).
[79] 549 F.2d at 435.
[80] *Id.* at 434.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 435.
[84] 42 U.S.C. § 2000e(b) (1976).
[85] *See, e.g.*, DEL. CODE ANN. tit. 19, §§ 710-718 (rev. 1974); IOWA CODE ANN. § 601A.6

sex discrimination in the employment field, the statutes either repealed or invalidated existing protective legislation in those jurisdictions.[86] Mississippi, however, remains one of ten states that does not per se prohibit sex discrimination in employment.[87]

3. Mississippi's Protective Laws

As late as 1980 Mississippi had two types of restrictive statutes in effect. One statute[88] limited the maximum hours and days which a woman could work. Another group of statutes[89] limited the employment possibilities of a woman in the Mississippi Highway Patrol. In 1981, both of these statutes became obsolete, one by repeal and the other by amendment.

a. Maximum Hours Statute

Mississippi's maximum hours statute[90] restricted women

(West 1974); MINN. STAT. ANN. §§ 363.01-.03 (West Supp. 1979); MONT. REV. CODES ANN. §§ 49-2-101 to -303 (1979); R.I. GEN. LAWS §§ 28-5-1 to -39 (1979 reenactment & Supp. 1980); WASH. REV. CODE ANN. §§ 49.60.010-.320 (Supp. 1979); WYO. STAT. §§ 27-9-101 to -109 (1977), *cited in* Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 NOTRE DAME LAW. 514, 525 n.102 (1972) (citing earlier versions of state codes).

[88] Some jurisdictions have determined that state anti-discrimination laws supersede protective laws. *See, e.g.*, Jarosak v. City of Minneapolis, [1969-1970 Transfer Binder] LAB. L. REP. (CCH) ¶ 9457, at 6845 (Minn. Dist. Ct. Nov. 18, 1969) (city ordinance prohibiting women from serving liquor at any public bar unless they are licensees or wives of licensees conflicts with state anti-discrimination and fair employment statutes); City of Milwaukee v. Wisconsin Dep't of Indus., Labor & Human Relations, 3 Empl. Prac. Dec. ¶ 8125, at 3694 (Wis. Cir. Ct. Feb. 24, 1971) (municipal ordinance banning bartending licenses to women invalidated by subsequent state statute); Longacre v. State, 448 P.2d 832, 834 (Wyo. 1968) (Fair Employment Act superseded Wyoming's statute prohibiting women from bartending).

[87] *See* 4 LAB. REL. REP. (BNA), State Labor Law 1:12, 1:13 (Nov. 7, 1977). Nine of these ten states are southern states: Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, North Dakota, Tennessee, Texas and Virginia.

[88] MISS. CODE ANN. § 71-1-33 (1972) (repealed 1981), originally promulgated in 1914 after Muller v. Oregon, 208 U.S. 412 (1908), provided:

> It shall be unlawful for any person, firm, or corporation to work any female in any laundry, millinery, dressmaking store, office, mercantile establishment, theater, telegraph or telephone office, or any other occupation not here enumerated more than ten hours per day or more than sixty hours per week, except in case of emergency or where public necessity requires it. This section shall not apply to domestic servants.

[89] MISS. CODE ANN. §§ 45-3-7 to -49 (1972) (amended 1981).

[90] *Id.* § 71-1-33 (repealed 1981).

other than domestic servants to a ten hour work day and a sixty hour work week. Obviously, the statute's prohibition was meaningless in many instances, for example, in the employment of professional women such as certified public accountants or in the employment of women farm workers. In non-professional employment, where the largest percentage of women are employed,[91] the statute served only to exclude or limit women from lucrative overtime compensation.

In the face of the *Rosenfeld* line of cases,[92] the Mississippi maximum hours statute was clearly vulnerable to a Title VII attack in some situations, and a BFOQ defense for the state would have been futile. However, as a result of the limitations of Title VII,[93] many Mississippi employers with small businesses were still able to rely on the maximum hours statute with impunity. The legislature could have taken one of two steps to cure the discriminatory aspects of the statute—repeal of the statute or extension of the statutory benefits.[94] Repeal of the statute

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[91] In 1978, 12.7% of Mississippi's employed women were professional or technical workers; 5.5% were managers or administrators; 5.7% were sales workers; 26.7% were clerical workers; 2.0% were craft workers; 22.2% were operatives (non-transportation); 1.0% were nonfarm laborers; 21.8% were service workers; and 1.4% were farm workers. U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT: STATES 27 (1978) (detailing women's employment roles).

[92] *See* notes 57 through 65 and accompanying text *supra*.

[93] 42 U.S.C. 2000e(b) (1976) (Title VII applicable only to employers with 15 or more employees).

[94] The EEOC guidelines suggest that certain discriminatory employment laws, such as statutes dealing with minimum wages, lunch and rest periods, overtime compensation, and rest days, can be cured by extending the benefits to both sexes. *See* 29 C.F.R. §§ 1604.2(b)(3)-(4) (1979).

Commonly, employers hire men instead of women to avoid expending additional money for the benefits required by law. The EEOC, cognizant of this, determined that benefit-conferring statutes would comply with Title VII if benefits were extended to men. Although the maximum hours type of statute was viewed by the EEOC as a limiting provision rather than a benefit-conferring provision, a maximum hours statute might be salvaged by making its provisions applicable to both sexes. *See id.* § 1604.2(b)(1); *cf.* Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1084 (9th Cir. 1972) (sex-based overtime statute conflicted with Title VII, but could be saved by equal application to both men and women workers).

Notwithstanding *Hays*, courts generally have viewed extensions of benefits as a legislative function. *See, e.g.*, Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20, 23 (9th Cir. 1974) (upholding lower court ruling that only legislature has power to regulate maximum overtime pay for female employees), *cert. denied*, 423 U.S. 1063 (1976).

presented the potential danger that small business employers not covered by Title VII could compel both men and women to work abnormally long work days.[95] Extension of the maximum hours laws to both sexes would, according to some commentators, "drastically change many work situations,"[96] and many courts have chosen to invalidate such laws rather than to extend them.[97] Despite this trend, it is equally logical to extend statutory benefits to both sexes. Apparently believing that an amendment to the statute would lead to federal litigation and possible invalidation of the statute under the supremacy clause,[98] the Mississippi Legislature voted to repeal it in 1981.[99]

b. Mississippi Highway Patrol Restrictions

Prior to their amendment in 1981, the Mississippi statutes governing hiring by the Mississippi Highway Patrol exemplified a type of "protective" legislation that actually limits women's employment opportunities.[100] The EEOC guidelines for Title VII

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[95] Presumably, only nonunion workers would be susceptible to such a threat, since union workers usually have their work hours and conditions prescribed in a collective bargaining agreement. *See* M. FORKOSCH, A TREATISE ON LABOR LAW § 557, at 859 (2d ed. 1965).

[96] *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 936 (1971) (discussing laws restricting conditions of employment and maximum hours of employment).

[97] *See, e.g.*, Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1099 (S.D. Ohio 1971) (state laws restricting employment of females, including statute regulating working hours, declared invalid), *rev'd on other grounds*, 474 F.2d 949 (1972); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 469 (W.D. Pa. 1971) (statutory regulation of working hours of female employees repealed by implication), *aff'd*, 480 F.2d 240 (3d Cir. 1973); Garneau v. Raytheon Co., 323 F. Supp. 391, 394 (D. Mass. 1971) (state law regulating working hours for women declared invalid because of conflict with federal law); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1308 (S.D. Ill. 1970) (same).

[98] *See* Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096-97 (S.D. Ohio 1971) (state protective laws conflict with Title VII of the Civil Rights Act; state law void by virtue of supremacy clause), *rev'd on other grounds*, 474 F.2d 949 (1972); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 474 (W.D. Pa. 1971) (same), *aff'd*, 480 F.2d 240 (3d. Cir. 1973).

[99] Act of March 2, 1981, ch. 310, 1981 Miss. Laws ___ (repealing MISS. CODE ANN. § 71-1-33 (1972)).

[100] Prior to amendment MISS. CODE ANN. § 45-3-7 (1972) (amended 1981) provided in part: "The commissioner is hereby authorized to employ not exceeding four hundred seventy-five (475) *men* as a Mississippi Highway Safety Patrol . . . ." (emphasis added). The entire code section regarding the highway patrol was manifestly phrased as male,

determine whether such provisions can withstand a sex discrimination claim. The guidelines explicitly provide that state statutes limiting or prohibiting the employment of women in certain occupations are superseded by the EEOC regulations.[101] Under Title VII, an employer may not stereotype an entire class, such as women, but must look to the capabilities of each individual.[102]

If the Mississippi Highway Patrol statutes[103] had been judicially challenged they would have been susceptible to invalidation. The primary flaw in the statutes was the blanket prohibition against female patrol officers; the statute did not allow individual evaluation of each woman applicant. However, the legal defects in the highway patrol provisions could not have been corrected merely by changing "men" to "persons," or "patrolman" to "patrol officer." The height-weight requirement in the code was also inherently discriminatory. By mandating a minimum height of five feet, nine inches and a minimum weight of 165 pounds for highway patrol officers, the legislature had implicitly and effectively barred women from these jobs. While this statutory requirement appeared sex neutral, enforcement of the requirement had a disparate impact on women as a class.[104] The decision of the United States Supreme Court in *Griggs v. Duke Power Co.*[105] prohibits such a disparate impact by a facially neu-

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negating application of MISS. CODE ANN § 1-3-17 (1972) which provides: "Words in the masculine gender shall embrace a female as well as a male, unless a contrary intention shall be manifest."

Additionally, MISS. CODE ANN. § 45-3-47(b) (1972) (amended 1981) imposed height and weight requirements for patrolmen which adversely affected women. It provided: "The commissioner shall . . . require a physical examination . . . to determine that each applicant selected is in good physical condition, including height of at least 5'9", weight not less than 165 pounds, with no deformities."

[101] 29 C.F.R. § 1604.2(b)(1) (1979).

[102] *Id.* This provision states: "The Commission [EEOC] has found that such [restrictive] laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex." *Cf.* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (individual evaluation necessary for compliance with EEOC guidelines).

[103] MISS. CODE ANN. §§ 45-3-7 to -49 (1972) (amended 1981).

[104] Prior to 1980, there were no women patrol officers in Mississippi. There are currently three female officers. Telephone conversation between Andy Alexander, Assistant Editor of the *Mississippi Law Journal*, and Paul Wells, Attorney, Legal Office, Mississippi Highway Patrol, Public Safety Commission (June 10, 1981).

[105] 401 U.S. 424, 429-31 (1971).

tral statute.

The court in *Meadows v. Ford Motor Co.*[106] applied the *Griggs* disparate impact principle to height-weight requirements. In *Meadows,* the Ford Motor Company required a minimum weight of 150 pounds for production line employees. Testimony established that although eighty per cent of females from eighteen to twenty-four years of age could not meet the weight requirement, seventy-nine per cent of men between the same ages qualified.[107] Furthermore, Ford was unable to establish a statistically sound nexus between the measure of strength and the minimum weight requirement.[108] Therefore, the court held that Ford had failed to prove a BFOQ defense. The disparate impact against women constituted sex discrimination proscribed by Title VII.[109]

The issue of height-weight requirements came before the United States Supreme Court in 1977 in *Dothard v. Rawlinson.*[110] Dianne Rawlinson sought employment as a prison guard in an Alabama maximum security prison. Although she satisfied the prison system's minimum height requirement of five feet, two inches, she did not meet the minimum weight requirement of 120 pounds.[111] The Court held for the Alabama Board of Corrections on other grounds,[112] but it affirmed the district court's ruling that the statutory weight and height requirements violated Title VII.[113] In determining that Rawlinson had established a prima facie case of illegal sex discrimination on that issue, the Court employed the *Griggs* disparate impact standard: "When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1% of the male

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[106] 62 F.R.D. 98 (W.D. Ky. 1973), *modified,* 510 F.2d 939 (6th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

[107] 62 F.R.D. at 99.

[108] *Id.*

[109] *Id.* at 100.

[110] 433 U.S. 321 (1977).

[111] *Id.* at 323-24.

[112] *Id.* at 334. The Court upheld a regulation excluding all women from security guard positions in male maximum security prisons as a BFOQ.

[113] *Id.* at 332.

population."[114]

Although the 1980 Mississippi Legislature rejected bills which would have amended the height-weight requirements and eliminated the sex bias in the highway patrol statutes, the 1981 legislative session saw the passage of a bill which accomplished the same objectives, thus remedying the legal defects in the highway patrol statutes.[115]

D. Loss of Consortium

Although at common law a husband could sue a third party for a tortious injury to his wife which resulted in a loss of consortium to him, the wife was not recognized as having any legal rights to her husband's consortium.[116] Loss of consortium was defined by the courts as the husband's loss of the companionship, society, services, sexual relations, comfort, and support of his spouse.[117] However, early twentieth century courts, perhaps motivated by progressive torts commentators, began to grant the wife the right to recover for loss of consortium in cases in which her husband was the victim of an intentional tort.[118]

Although legislation was not necessary to expand the common law, the Mississippi court, like some other state courts, waited for the legislature to enact a law giving a wife the right to sue.[119] The promulgation of that law came in 1968 as an amendment to the present Married Women's Property Act.[120] Despite the 1968 amendment, the right of married women to sue for loss of consortium has remained less than the full common law right

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[114] *Id.* at 329-30.

[115] S. 2437, enacted as ch. 511, 1981 Miss. Laws ___, changes the language of MISS. CODE ANN. §§ 45-3-7 to -49 (1972) from male-oriented to gender-neutral. In addition, the objectionable height-weight provisions were amended to require the applicant to conform to a height-weight ratio recommended by the United States Air Force.

[116] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 894 (4th ed. 1971).

[117] *Id.*

[118] *Id.*

[119] *See, e.g.*, Nash v. Mobile & O.R.R., 149 Miss. 823, 835, 116 So. 100, 103 (1928) (court will not allow wife to recover for loss of consortium until legislature acts).

[120] Act of May 27, 1968, ch. 304, § 1, 1968 Miss. Laws 416 (codified at MISS. CODE ANN. § 93-3-1 (1972)). The amendment added the sentence "[a] married woman shall have a cause of action for loss of consortium through negligent injury of her husband" to the existing Married Women's Property Act.

of married men. The amendment referred only to "negligent" injury.[121] Injury resulting from intentional torts is implicitly excluded.[122] Ironically, when courts first began allowing wives' actions for loss of consortium, they did so in instances where husbands were victims of intentional torts.[123]

Regardless of the limitation in the statute, the courts could remedy the inequity without corrective legislation. While a court should not rectify sexual inequality in a criminal statute by enlarging the class susceptible to criminal penalties,[124] it may either expand the common law or extend an underinclusive noncriminal statute.[125] An extension of the 1968 amendment[126] would provide equal rights of consortium to wives. Such a judicial remedy would be appropriate to a civil claim of sex discrimination under the fourteenth amendment in the absence of legislative action. Furthermore, it would be in accordance with decisions of both state courts[127] and federal courts,[128] as well as with the position of the *Restatement (Second) of Torts.*[129]

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[121] MISS. CODE ANN. § 93-3-1 (1972).

[122] The Mississippi Supreme Court has not addressed the issue whether the amended MISS. CODE ANN. § 93-3-1 (1972) grants a cause of action for intentional injury. The only case reported subsequent to the amendment, Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974), involved negligence.

[123] *See, e.g.,* Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 150-51 (1940) (wife's recovery for loss of consortium upheld against one who knowingly sold intoxicating liquor to her husband); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102, 106-07 (1912) (wife recovered for loss of consortium against one who intentionally sold morphine to her husband resulting in his confinement in an insane asylum); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482, 483 (1940) (wife recovered for loss of consortium when husband's death resulted from defendant's willful and malicious sale of intoxicating liquor to him over protest, warnings and written notice); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998, 1001 (1917) (wife recovered for loss of consortium from one who knowingly sold opium to her husband). *See generally* W. PROSSER, *supra* note 116, § 125, at 895 & n.8.

[124] *See* notes 203, 204 and accompanying text *infra.*

[125] *See* Comment, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative,* 12 COLUM. J.L. & SOC. PROB. 116 *passim* (1975) (tracing the historical and modern trends in judicial extension of statutes); *cf.* note 94 *supra* (compliance with EEOC guidelines through extension of coverage to males).

[126] *See* note 120 *supra.*

[127] *See* note 123 *supra.*

[128] *See, e.g.,* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 858 (D.V.I. 1976) (wife's claim for loss of consortium upheld under general maritime law); Benjamin v. Cleburne Truck & Body Sales, Inc., 424 F. Supp. 1294, 1296-98 (D.V.I. 1976) (wife granted cause of action for loss of consortium on basis of equal protection clause).

[129] *See* RESTATEMENT (SECOND) OF TORTS § 693, Comment b at 495-96 (1977). In an

E. Employees' Benefits

1. United States Supreme Court Decisions

Economic discrimination against women and society's concomitant undervaluation of traditional women's work can also result in discrimination against men. Several major United States Supreme Court cases have dealt with regulations which automatically provide benefits to women, while either denying such benefits to men or requiring that the male prove his dependence on his wife. The first significant case was *Frontiero v. Richardson.*[130] In that case the Air Force denied Lieutenant Sharon Frontiero's application for quarters allowances and medical and dental benefits for her civilian husband.[131] Under the federal statutes, Sharon Frontiero's husband could obtain these benefits only upon proof that he was "dependent" on her for more than one half of his support.[132] However, the benefits denied to Lieutenant Frontiero's husband were available to wives of servicemen as an automatic right.[133] Frontiero, alleging a fifth amendment due process violation,[134] prevailed before the United States Supreme Court.[135] Using what appeared to be the strict scrutiny standard of judicial review[136] the Court declared the statute unconstitutional.[137] The Court determined that only administrative convenience was served by the statutory distinction

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action by one spouse for harm caused by tortious conduct against the other spouse, "[t]he word 'tortious' . . . includes conduct intended to cause harm, conduct that is negligent and conduct that is carried on at the risk of the actor." *Id.* at 495.

[130] 411 U.S. 677 (1973).

[131] *Id.* at 680.

[132] *Id.* at 678.

[133] *Id.* at 680.

[134] Since Frontiero alleged discrimination by the federal government, her claim was based on the fifth amendment rather than the fourteenth amendment. *Id.* at 680 n.5.

[135] *Id.* at 690-91.

[136] *Id.* at 682-83 (citing Reed v. Reed, 404 U.S. 71 (1971), in which an Idaho statute giving preference to male relatives as administrators of estates was held to violate the equal protection clause of the fourteenth amendment). The *Reed* Court employed a judicial standard which is often referred to as the "strict reasonableness" test and which is less stringent than the strict scrutiny test. *See* notes 11 through 14 *supra.*

In *Frontiero,* a plurality of the Court seemingly considered sex a suspect classification requiring strict scrutiny, but in Craig v. Boren, 429 U.S. 190 (1976), the Court settled on the middle tier of review. *Id.* at 197-98.

[137] 411 U.S. at 691.

between men and women and concluded that "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' "[138]

Another case, *Kahn v. Shevin*,[139] concerned a Florida property tax exemption statute which granted an annual property tax exemption of $500 solely to widows. Kahn, a widower, alleged that the statute, by limiting the benefits to women, violated his equal protection rights.[140] Justice Douglas, writing for six members of the Court, held that the sex classification was valid because there was a "fair and substantial relation to the object of the legislation."[141] Douglas, concluding that the statute was designed to alleviate the past and present effects of discrimination against women in the labor market, stated: "While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."[142]

Had *Kahn* been the final word from the Court on the constitutionality of sex-discriminatory statutes, such statutes might remain valid. However, three subsequent decisions by the Supreme Court concerning Social Security benefits indicate that such statutes are unconstitutional, unless certain requirements are met.[143]

In the landmark decision, *Weinberger v. Wisenfeld*,[144] Mrs. Wisenfeld's earnings were the principal source of the family's income. Following her death, her husband applied for survivor's

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[138] *Id.* at 690.

[139] 416 U.S. 351 (1974).

[140] *Id.* at 352.

[141] *Id.* at 355-56 (quoting Reed v. Reed, 404 U.S. at 76).

[142] 416 U.S. at 354.

[143] Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

[144] 420 U.S. 636 (1975).

benefits for himself and dependent's benefits for his infant child from the Social Security office. Although his son was granted dependent's benefits, Wisenfeld's application for survivor's benefits for himself was denied, even though his wife had paid Social Security taxes for the requisite number of years. Indisputably, women qualified more easily than men for survivor's benefits under the Social Security law.[145]

The Court unanimously held that the sex distinction in the Social Security statute was "indistinguishable"[146] from the statute invalidated in *Frontiero*.[147] The Court determined that the Social Security statute did not share the remedial purpose underlying the Florida statute in *Kahn v. Shevin*.[148] Rather, in *Wisenfeld* the Court found that the legislative intent was to provide the children of a deceased parent the opportunity of full-time care by the surviving parent.[149] Since the statute presupposed that only surviving mothers would provide this care, the sex distinction was deemed irrational and unconstitutional.[150] Significantly, the Court found two unconstitutional factors in the statute: (1) the sex-based distinction based upon stereotypical and antiquated assumptions of female dependency,[151] and (2) the violation of women wage earners' equal protection rights to provide for their families in the same manner as male wage earners.[152]

In *Califano v. Goldfarb*,[153] the Court focused on the discrepancy between old-age widows' and widowers' survivor's benefits under the Federal Old-Age, Survivors, and Disability Insurance Benefits Program (OASDI).[154] Under the OASDI Program, qual-

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[145] *Id.* at 639. Under 42 U.S.C. § 402(g) (1970 & Supp. III 1973) (amended 1977), a widow was entitled to mother's insurance benefits if she had a minor child. If the widow was working, those benefits were reduced one dollar for every two dollars earned over $2,400. *Id.* §§ 403(b),(f) (amended 1977). 420 U.S. at 640-41.

[146] 420 U.S. at 642, 653.

[147] *Id.* at 642-43.

[148] *Id.* at 648.

[149] *Id.* at 648-51.

[150] *Id.* at 651-53.

[151] *Id.* at 651-52.

[152] *Id.* at 645.

[153] 430 U.S. 199 (1977).

[154] *Id.* at 201-02. *See* 42 U.S.C. §§ 402(e)(1), (f)(1) (1970 & Supp. V 1975) (amended 1977).

ifying widows received survivor's benefits at a certain age based on their deceased husbands' earnings. Widowers at the same age were not eligible for similar survivor's benefits unless they additionally proved that they had been receiving at least one half of their support from their deceased wives.[155] The Court held this requirement of proof violated the fifth amendment due process clause.[156] The statute was based on the "archaic and overbroad"[157] assumption that only wives are dependent on their spouses. The Court held that this underlying assumption was not rational and did not justify a gender-based distinction in the distribution of survivor's benefits.[158]

The final case in the Social Security trilogy is *Califano v. Webster*,[159] which was decided in a per curiam opinion on the same day as *Goldfarb*. The Social Security statute at issue in *Webster* used different procedures to compute male and female wage-earners' old-age insurance benefits.[160] The result of this distinction was a higher level of monthly old-age insurance benefits for retired women workers than for their male counterparts.[161] The government defended the distinction on the *Kahn* theory of a remedial compensatory purpose. The Court, accepting the government's argument, stated that the "challenged statute operated directly to compensate women for past economic discrimination"[162] which traditionally placed and kept women in lower-paying jobs than those of men.[163] Since the legislative history of the statute specifically demonstrated that the law was drafted for this purpose, the Court upheld the statute.[164]

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[155] 42 U.S.C. § 402(f)(1) (1970 & Supp. V 1975) (amended 1977).

[156] 430 U.S. at 202.

[157] *Id.* at 207 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[158] 430 U.S. at 214-17.

[159] 430 U.S. 313 (1977).

[160] *Id.* at 314-16. *See* 42 U.S.C. § 415 (1970 & Supp. V 1975) (amended 1972).

[161] 430 U.S. at 314-16. This Social Security provision was amended in 1972 to equalize treatment of retired male and female workers. However, it did not apply to males who reached age 62 before 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, § 104(b), 86 Stat. 1340 (amending 42 U.S.C. § 415(b) (1970)).

[162] 430 U.S. at 318.

[163] *Id.*

[164] *Id.*

Goldfarb and *Wisenfeld* have since developed their own progeny. In at least three subsequent cases the United States Supreme Court has invalidated Social Security statutes containing sex-based classifications in benefits for aged spouses.[165]

Analysis of this entire line of cases, especially the *Wisenfeld-Goldfarb-Webster* trilogy, discloses that statutes which create or sanction economic disparities between men and women are unconstitutional if they are based on traditional sexual stereotypical notions such as female dependency. However, if the purpose of the statutory classification is remedial and if the government can show a strong correlation between the classification and the remedial purpose, then the statute may withstand a constitutional challenge.[166]

2. Mississippi Death Benefits Statutes

a. Worker's Compensation Statute

The Mississippi Code provides a death benefit for the widow of a man killed at his place of employment and covered by worker's compensation.[167] Under this statute a surviving wife

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[165] *See* Abbott v. Weinberger, Civ. No. C-74-194 (N.D. Ohio Feb. 11, 1976) (gender based classification of Social Security Act's old age and disability insurance benefits held unconstitutional), *aff'd mem. sub nom.* Califano v. Abbott, 430 U.S. 924 (1977); Jablon v. Secretary of HEW, 399 F. Supp. 118 (1975) (same), *aff'd mem.*, 430 U.S. 924 (1977); Sibowitz v. Secretary of HEW, 397 F. Supp. 862 (1975) (same), *aff'd mem.*, 430 U.S. 924 (1977).

[166] B. BABCOCK, *supra* note 39, at 62 (W. Williams, Supp. 1978).

[167] MISS. CODE ANN. § 71-3-25(a), (c), (g) (Supp. 1979) provides:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> (a) An immediate lump sum payment of two hundred fifty dollars ($250.00) to the widow, in addition to other compensation benefits.
>
> . . .
>
> (c) If there be a surviving wife or dependent husband and no child of the deceased, to such wife or dependent husband thirty-five percent (35%) of the average wages of the deceased during widowhood or dependent widowhood and, if there be a surviving child or children of the deceased, the additional amount of ten percent (10%) of such wages for each such child.
>
> . . .
>
> (g) . . . A surviving wife, child or children shall be presumed to be wholly dependent. All other dependents shall be considered on the basis of total or partial dependence as the facts may warrant.

can always collect the benefit. However, a surviving husband cannot ordinarily recover any such lump-sum benefit upon the death of his wife. An exception to this prohibition occurs only if the husband proves financial dependence on the wife. The statute explicitly presumes that a wife is always dependent on her husband,[168] while impliedly presuming that a husband is rarely dependent on his wife. Application of the *Goldfarb* line of cases to this statute[169] indicates its constitutional defects. When other state supreme courts have considered similar statutes, they have invalidated them on fourteenth amendment grounds. The most notable case from a state court is *Arp v. Workers' Compensation Appeals Board.*[170]

In 1977, the United States Supreme Court affirmed a decision similar to *Arp* in *Railroad Retirement Board v. Kalina,*[171] which involved a fifth amendment challenge to the constitutionality of the retirement annuities provision of the federal Railroad Retirement Act.[172] The Court, in a memorandum opinion, upheld the determination of the Sixth Circuit Court of Appeals that there was an equal protection violation. The court of appeals had employed the *Arp* rationale in reaching its conclusion.[173]

Finally, in 1980, the United States Supreme Court had the opportunity to address the precise issue faced by the *Arp*

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[168] *Id.* § 71-3-25(g).

[169] *Id.* § 71-3-25(a), (c), (g).

[170] 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977). California's workers' compensation scheme provided a presumption of total dependency for widows but not for widowers. Holding that this provision was unconstitutional under the equal protection clauses of the United States and California constitutions, *id.* at 407, 563 P.2d at 856, 138 Cal. Rptr. at 300, the California Supreme Court invalidated the provision. *Id.* at 411, 563 P.2d at 858, 138 Cal. Rptr. at 302.

[171] 541 F.2d 1204 (6th Cir. 1976), *aff'd mem.*, 431 U.S. 909 (1977).

[172] The challenged provision of the Railroad Act provided in part that a wife of a retired male employee was automatically entitled to a spouse's annuity, whereas the husband of a retired female employee had to prove financial dependence upon his wife for at least one half of his support to receive an annuity. 541 F.2d at 1205-06.

[173] *Id.* at 1210. In fashioning a remedy, the court apparently attempted to extend the statutory benefits to all spouses rather than to invalidate the statute. The Railroad Retirement Act of 1937 was amended by the Railroad Retirement Act of 1974, Pub. L. No. 93-445, 88 Stat. 1305 (codified at 45 U.S.C. § 231a(c)(3)(ii) (1976)). The new act leaves virtually unchanged the sexually discriminatory provisions.

court.[174] In *Wengler v. Druggists Mutual Insurance Co.*, the Court examined the Missouri worker's compensation death benefit statute.[175] The Missouri statute provided that a deceased worker's widow was automatically entitled to the death benefit. If the deceased worker was a married woman, her widower was entitled to the death benefit only if he could prove he had been either actually dependent on his wife, or that he was physically or mentally unable to work.[176]

The widower Wengler did not meet the statutory criteria necessary to recover the death benefit, and he claimed the statute violated the fourteenth amendment.[177] The Court, relying on state court decisions such as *Arp* and its own *Goldfarb-Wisenfeld* line of decisions, agreed.[178] The Court held that the statute discriminated against both sexes.[179] The female worker suffered discrimination because her beneficiary, the surviving spouse, was not entitled to the same benefits that a male worker's spouse would be. Likewise, the statute discriminated against men by requiring widowers to prove actual dependence, while the statute, by conclusively presuming widows were total dependents, imposed no such burdens on them.[180]

These cases, and particularly *Wengler,* demonstrate that both the conclusive presumption of female dependency and its concomitant burden on widowers of deceased female employees in the Mississippi statute are unqualifiedly unconstitutional. A bill introduced during the 1980 session of the Mississippi Legislature would have extended lump-sum death benefits to all surviving spouses.[181] Although favorable legislative action would have prevented needless litigation over the statute's validity, the

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[174] Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

[175] Mo. Rev. Stat. § 287.240 (Supp. 1979).

[176] *Id.* § 287.240 (4)(a).

[177] 446 U.S. at 146. The Missouri Supreme Court rejected this contention, holding that the disparate treatment accorded by the statute was justified because of the difference in economic standing between working men and women.

[178] *Id.* at 152. The Court declined to decide whether the statute should be extended or invalidated, instead remanding the case to the Missouri Supreme Court for a determination of that issue. *Id.* at 152-53.

[179] *Id.* at 147.

[180] *Id.* at 149.

[181] H.R. 640, 1980 Miss. Leg., Reg. Sess.

legislature has failed to correct the defect.

b. Policemen's and Firemen's Death Benefit Statutes

Prior to their recent amendment, Mississippi statutes establishing death benefits for widows of policemen and firemen were susceptible to constitutional attack for similar reasons.[182] Unlike the worker's compensation death benefit statute, which contains some provisions for dependent husbands,[183] these statutes were couched exclusively in terms of the deceased employee being male and the surviving spouse being a "widow." By providing benefits only for widows and not for widowers, the statutes were blatantly unconstitutional. Although the Mississippi Legislature amended sections 21-29-145 and 21-29-255 to eliminate the inequalities between widows and widowers of members of the police or fire departments, the same language in section 21-29-147 was inexplicably overlooked when the amendments were adopted.[184]

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[182] *See* MISS. CODE ANN. §§ 21-29-145, -147, -255 (1972) (amended 1980). Women comprise 14.8% of full time and 55.4% of part time police employees and .6% of the fire protection employees in Mississippi. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 5 MINORITIES AND WOMEN IN STATE AND LOCAL GOVERNMENT 133-37 (1975).

[183] MISS. CODE ANN. § 71-3-25 (Supp. 1980). *See* note 167 *supra.*

[184] MISS. CODE ANN. § 21-29-147 (Supp. 1980) provides in part:

> Should any member of a fire or police department die while a member of said fire or police department, and who has had not less than five (5) years' service with such department there shall be paid . . . as follows:
>
> . . . .
>
> (b) for each full year of active service in excess of twenty (20) years service, an additional payment in a sum equal to one and seven-tenths (1 7/10%) of the same average monthly base salary and longevity pay received by such member in the six-month period next preceding his death . . . to the *widow* of such deceased for the use of herself and the child or children of said deceased, under the age of eighteen (18) years, . . . and after the death or marriage of the *widow,* all payments to *her* shall cease . . . . If the deceased be not survived by *widow* or child or children under the age of eighteen (18) years, but be survived by a father dependent upon him or a mother dependent upon him, or an *unmarried sister* dependent upon him, such payments shall continue to be made to such dependent father or mother or both, so long as each shall live, or if there be no dependent father or mother surviving the deceased, such payments shall continue to be made to the dependent *sister* or dependent *sisters* of the deceased, . . . so long as such beneficiary or beneficiaries, shall remain unmarried. Upon the death or marriage of any such *sisters,* all payments shall cease to her . . . .

Even after amendment, these statutes still provide benefits based on the "archaic and overbroad generalization" that women are financially dependent on men. An illustration of this still extant belief is found in provisions that certain death benefits go to unmarried dependent sister(s) of the employee.[185] These statutes do not limit themselves to unmarried minor sisters nor are they broad enough to apply to unmarried dependent brothers. The only justification for the anachronism is the outmoded notion that a woman is always dependent upon a man. Though the 1980 legislature did amend the statutes to alleviate the discrepancy between widowers and widows, it nevertheless failed to correct the inequality of treatment between unmarried dependent brothers and unmarried dependent sisters.

II. Discrimination in Criminal Statutes

Several of Mississippi's penal statutes, particularly in the area of sex crimes, are based on the antiquated belief that only men commit such crimes. There are several criminal statutes in the Mississippi Code under which only males can be prosecuted. The sex-based classifications in these statutes raise interesting constitutional questions.

A. The Voyeurism or "Peeping Tom" Statute

In *Green v. State*,[186] the Mississippi Supreme Court upheld the constitutionality of the Mississippi voyeurism or "Peeping Tom" statute,[187] which penalized only males for such activity.

It is the intention of the legislature that the benefits authorized by subsection (b) of this section, shall be paid to all qualified and eligible *widows* whose deceased husbands died prior to the effective date of this section (emphasis added).

[185] Miss. Code Ann. §§ 21-29-145, -147, and -255 (Supp. 1980), all contain this provision.

[186] 270 So. 2d 695 (Miss. 1972).

[187] Miss. Code Ann. § 97-29-61 (1972) (amended 1980) formerly provided:

Any male person who enters upon real property whether the original entry is legal or not, and thereafter prys or peeps through a window or other opening in a dwelling or other building structure for the lewd, licentious and indecent purpose of spying upon the occupants thereof, commonly called a "peeping Tom," shall be guilty of a felonious trespass; and upon conviction, shall be imprisoned in the state penitentiary not more than five years.

Green, convicted under this statute, had based his appeal in part on the equal protection clause of the fourteenth amendment. However, the Mississippi Supreme Court stated: "We are of the opinion that the Legislature, by this statute, took note of the fundamental difference between men and women, and recognized that looking at persons for a lewd, licentious and indecent purpose is an activity traditionally ascribed to men rather than women."[188] Thus, using the minimum scrutiny of the rational relation test as its judicial standard, the court determined that the statute was not based on an "invidious and patently arbitrary sex classification."[189] The court found that since the legislature's purpose was to prevent rape and sex crimes "[d]ue to the possibility of rape following lewd spying, the singling out of males is permissible."[190] Since the evidence did not establish a connection between physical sexual crimes and voyeurism, the court apparently took judicial notice of such a nexus.[191]

B. Anti-Fondling Statute

Subsequent to *Green,* an equal protection defense was successful against the Mississippi anti-fondling law.[192] When the statute was promulgated in 1920, Mississippi's all-male legislature apparently believed that the forbidden fondling or licentious handling of children was exclusively a male crime. In the 1979 case of *Tatro v. State,*[193] the Mississippi Supreme Court recognized that women were capable of commiting such a

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[188] 270 So. 2d at 695.

[189] *Id.* at 697.

[190] *Id. See* Burchfield v. State, 277 So. 2d 623, 625 (Miss. 1973) (court determined that voyeurism could only be committed by males); *cf.* Love v. State, 211 Miss. 606, 618, 52 So. 2d 470, 471 (1951) (child molesting could only be committed by males).

[191] 270 So. 2d at 697.

[192] MISS. CODE ANN. § 97-5-23 (1972) (amended 1980) formerly provided:

> Any male person above the age of eighteen years, who, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his body or any member thereof, any child under the age of fourteen years, with or without his consent, shall be guilty of a high crime and upon conviction thereof, shall be fined . . . or be imprisoned in the state penitentiary . . . or be punished by both . . . fine and imprisonment, at the discretion of the court.

[193] 372 So. 2d 283 (Miss. 1979).

crime.[194]

Tatro, convicted of child molesting under the "anti-fondling statute," appealed on equal protection grounds. He argued that while men committing the proscribed acts upon children faced incarceration, a woman committing the same acts upon the protected class violated no law.[195]

The Mississippi Supreme Court held that the anti-fondling statute was unconstitutional,[196] rejecting the state's argument that the *Green* rationale was similarly applicable to the anti-fondling statute.[197] As a result of the intervening United States Supreme Court decision in *Craig v. Boren*,[198] the court applied the stricter standard of scrutiny to the anti-fondling statute than the reasonable relationship test given to the voyeurism statute in *Green*. Using the substantial relationship standard,[199] the Mississippi Supreme Court ruled that statutory classification of males as the only punishable offenders was not substantially related to a governmental objective. In fact, the court indicated that not even the lower rational relation standard[200] was satisfied by a classification which subjected only men to prison for commission of an act.[201] The court further noted that the state had failed to establish any public policy or rational basis for this unequal treatment of the sexes.[202]

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[194] *Id.* at 285. *Contra,* Love v. State, 211 Miss. 606, 52 So. 2d 470 (1951), in which the court reversed a fondling conviction because of a failure to allege that the defendant was male. "[T]he fact that [the] defendant is a male," the court stated, "is a *sine qua non* of the crime." *Id.* at 610, 52 So. 2d at 471.

[195] 372 So. 2d at 283.

[196] *Id.* at 285. The Mississippi Supreme Court, although not mentioning the fourteenth amendment, used language from Orr v. Orr, 440 U.S. 268, 283 (1979) (Alabama statute authorizing award of alimony only to females violated fourteenth amendment), Craig v. Boren, 429 U.S. 190, 204 (1976) (gender-based distinction in legal drinking age violated fourteenth amendment), and sex discrimination cases from other states and lower federal courts.

[197] 372 So. 2d at 284.

[198] 429 U.S. 190, 204 (1976) ("substantial relationship" test).

[199] *See* notes 11, 14 and accompanying text *supra.*

[200] *See* note 12 and accompanying text *supra.*

[201] 372 So. 2d at 284.

[202] *Id.* Understandably, the court did not overrule Green v. State, 270 So. 2d 645 (Miss. 1972) ("peeping Tom" statute). Since reversal of Tatro's conviction was an unpopular decision, the court apparently did not wish to exacerbate public outcry by attacking another statute that was not before it.

The dissent in *Tatro* proposed *sua sponte* a judicial rectification of the problem—striking the word "male" from the statute.[203] Although such action would have been popular, easy, and appealing, it would have been a judicial usurpation of legislative prerogative. Only in civil cases should such a judicial solution occur. As correctly pointed out in the majority opinion, the court should never create a crime or extend criminal liability to a new class of offenders.[204]

After *Tatro* was cited as binding precedent in *Catchot v. State*,[205] the Mississippi Legislature corrected the unconstitutional aspects of the anti-fondling statute[206] and several other criminal statutes similarly infirmed. In addition to the anti-fondling statute, the 1980 legislature amended the voyeurism statute[207] and seven other criminal statutes[208] by making the classification of offenders sex-neutral. The legislature's quick response to the *Tatro* decision was commendable; however, the legislature apparently overlooked several sex-discriminatory criminal

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[203] 372 So. 2d at 285.

[204] *Id.* at 285-87; *cf.* Hudson v. McAdory, 268 So. 2d 916, 922-23 (Miss. 1972) (classification of crime as capital offense is a legislative, not judicial, function). *See generally* Comment, *supra* note 125, at 116 *passim* (judicial extension of statute to classes not contemplated by legislature, in lieu of invalidation of the statute).

[205] 374 So. 2d 807, 808 (Miss. 1979).

[206] S. 2359, 1980 Miss. Leg., Reg. Sess., enacted as ch. 387, 1980 Miss. Laws 706 (amending MISS. CODE ANN. § 97-5-23 (1972)) (deleted the word "male" and referred to potential offenders by both gender pronouns).

[207] S. 2128, 1980 Miss. Leg., Reg. Sess., enacted as ch. 391, 1980 Miss. Laws 708 (amending MISS. CODE ANN. § 97-29-61 (1972)) (deleted the word "male").

[208] S. 2062, 1980 Miss. Leg., Reg. Sess., enacted as ch. 357, 1980 Miss. Laws 645 (amending MISS. CODE ANN. § 97-5-7 (1972)) (prohibition against enticement into employment); S. 2130, 1980 Miss. Leg., Reg. Sess., enacted as ch. 356, 1980 Miss. Laws 645 (amending MISS. CODE ANN. § 97-3-1 (1972)) (abduction of child over age 14 for purpose of marriage); S. 2061, 1980 Miss. Leg., Reg. Sess., enacted as ch. 388, 1980 Miss. Laws 706 (amending MISS. CODE ANN. § 97-29-7 (1972)) (prohibition of guardian-ward sexual relations); S. 2064, 1980 Miss. Leg., Reg. Sess., enacted as ch. 389, 1980 Miss. Laws 707 (amending MISS. CODE ANN. § 97-35-11 (1972)) (abusive language and indecent exposure); S. 2125, 1980 Miss. Leg., Reg. Sess., enacted as ch. 390, 1980 Miss. Laws 707 (amending MISS. CODE ANN. § 97-3-67 (1972)) (carnal knowledge of an unmarried child between ages 12 and 18); S. 2129, 1980 Miss. Leg., Reg. Sess., enacted as ch. 392, 1980 Miss. Laws 708 (amending MISS. CODE ANN. § 97-5-21 (1972)) (prohibiting seduction of chaste child under 18 years of age); S. 2124, 1980 Miss. Leg., Reg. Sess., enacted as ch. 517, 1980 Miss. Laws 1205 (amending MISS. CODE ANN. § 97-29-3 (1972)) (prohibition against teacher-pupil sexual relations).

statutes.

C. *Miscellaneous Statutes*

There are three miscellaneous sex-discriminatory criminal statutes in the Mississippi Code. One penalizes a male office holder or fiduciary whose wife accepts a bribe with his knowledge.[209] This statute, apparently based on the notion that only males are office holders, imposes no criminal liability on a female office holder or fiduciary whose husband accepts a bribe under similar circumstances. Another statute imputes criminal liability to a father for knowingly allowing his son under the age of sixteen to carry a concealed weapon.[210] Although parental statutory obligations are generally uniform,[211] under this statute the state is unable to charge criminally either a father who allows his daughter to conceal a gun or a mother who permits her son or daughter to carry a concealed weapon. Finally, the "Tramp" statute of 1880[212] limits prosecution to males over the age of sixteen years. Women similarly situated can be prosecuted only under the vagrancy statute which was adopted in 1904.[213]

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[209] MISS. CODE ANN. § 97-11-13 (1972) provides in part:

> If any officer, agent, or trustee shall accept any gift, offer, or promise, or if his wife, with his knowledge and consent, shall accept any gift, offer, or promise . . . , he shall, on conviction, be forever disqualified from holding any public office, trust, or appointment, and shall forfeit his office, if any be held, and be imprisoned in the penitentiary . . . or be fined . . . or both.

[210] MISS. CODE ANN. § 97-37-15 (1972) provides in part: "Any father who shall knowingly suffer or permit any son under the age of sixteen years to have or to own, or to carry concealed . . . any weapon the carrying of which concealed is prohibited, shall be guilty of a misdemeanor . . . ."

[211] *See, e.g.*, MISS. CODE ANN. § 97-5-3 (1972), which provides in part: "*Any* parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children . . . shall be guilty of a felony . . . ." (emphasis added).

[212] MISS. CODE ANN. § 97-35-29 (1972) provides that:

> Any male person over sixteen years of age, and not blind, who shall go about from place to place begging and asking subsistence by charity, and all who stroll over the country without lawful occasion, and can give no account of their conduct consistent with good citizenship, shall be held to be tramps.

[213] MISS. CODE ANN. § 97-35-37 (1972) defines, in sex-neutral terms, "vagrants." The possible sentence for violation of the tramp statute, *id.* § 97-35-29, is less than for violation of the vagrant statute, *id.* § 97-35-37. Sentencing disparities could arise if a female were convicted under the vagrant statute for behavior proscribed to males by the tramp

D. Rape and Sodomy Statutes

The Mississippi Code has two basic provisions governing the crime of rape.[214] Section 97-3-65 prohibits forcible rape,[215] as well as carnal knowledge, whether forcible or not, of a child under twelve years of age.[216] Statutory rape, the nonforcible carnal knowledge of a previously chaste person between the ages of twelve and eighteen years, is prohibited by section 97-3-67.[217] Before 1980 both of these statutes applied only to a violation perpetrated against a female. Thus, prior to the recent adoption of the sexual battery statutes,[218] prosecutors had to rely solely

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statute.

[214] *Id.* §§ 97-3-65, -67 (Supp. 1980).

[215] MISS. CODE ANN. § 97-3-65(2) (Supp. 1980) provides:

> Every person who shall forcibly ravish any female of the age of twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of any female above the age of twelve (12) years without her consent, by administering to her any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistence, upon conviction shall be imprisoned for life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine.

[216] MISS. CODE ANN. § 97-3-65(1) (Supp. 1980) provides:

> Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve (12) years, upon conviction, shall be sentenced to death or imprisonment for life in the state penitentiary; provided, however, any person thirteen (13) years of age or over but under eighteen (18) years of age convicted of such crime shall be sentenced to such term of imprisonment as the court, in its discretion, may determine. In all cases where the female child is under the age of twelve (12) years it shall not be necessary to prove penetration of the female's private parts where it is shown the private parts of the female have been lacerated or torn in the attempt to have carnal knowledge of her.

[217] MISS. CODE ANN. § 97-3-67 (Supp. 1980) provides:

> Any person who shall have carnal knowledge of any unmarried person of previously chaste character younger than himself or herself and over twelve (12) and under eighteen (18) years of age, upon conviction, shall be punished either by a fine not exceeding five hundred dollars ($500.00), or by imprisonment in the county jail not longer than six (6) months, or by both such fine and imprisonment or by imprisonment in the penitentiary not exceeding five (5) years; and such punishment, within said limitation, shall be fixed by the jury trying each case, or by the court upon the entry of a plea of guilty.

[218] *Id.* §§ 97-3-95 to -103. The statutes provide in part:

> A person is guilty of sexual battery if he or she engages in sexual penetration with:

on the sodomy statute[219] to protect sexually molested males. The sodomy statute, however, carries a maximum penalty of only ten years, while the common law rape statute permits a maximum penalty of life imprisonment for the rape of a female over twelve years of age. If the female is younger than twelve, the convicted rapist could be subject to the death penalty.[220] Given the possible sentencing disparities between the rape statute and the sodomy statute, defendants in prosecutions for female rape in similarly situated jurisdictions began to raise equal protection arguments as a defense.[221] Since the new sexual battery statute provides for a maximum sentence of thirty years, defendants in common law rape cases may still continue to raise equal protection violations. However, the 1980 amendment of the statutory rape statute which protects previously chaste boys as well as girls was thought by the legislature to preclude any equal protection problems in that particular statute.[222]

(a) Another person without his or her consent; or

(b) A mentally defective, mentally incapacited, or physically helpless person.

Id. § 97-3-95.

For purposes of [this act] the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

. . . .

Id. § 97-3-97.

Every person who shall be convicted of sexual battery shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years; provided, however, that any person convicted of a second or subsequent offense under this act shall be imprisoned in the penitentiary for not less than five (5) years nor more than thirty (30) years.

Id. § 97-3-101.

[This act] shall not be held to repeal, modify or amend any other criminal statute of this state.

Id. § 97-3-103.

[219] MISS. CODE ANN. § 97-29-59 (1972) provides: "Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."

[220] *See* note 216 *supra*.

[221] *See, e.g.*, note 225 *infra*.

[222] Prior to amendment MISS. CODE ANN. § 97-3-67 (1972) (amended 1980) provided that "any male person who shall have carnal knowledge of any unmarried female person

In asserting equal protection claims, forcible rape defendants could contend that the forcible rape statute[223] is constitutionally defective either because (1) it does not subject women offenders to criminal punishment or (2) it does not protect males as potential victims. Several defendants thus far have raised the first claim, but with minimal success. Because of human physiology, courts have been reluctant to rule that a woman can force a man against his will to have sexual intercourse.[224] The second claim, however, presents the interesting and compelling argument that the statute is defective because it punishes only those rapists whose victims are women. This argument has been more frequently employed in statutory rape cases, although with limited success.[225]

1. Statutory Rape

Like most jurisdictions, the Mississippi statutory rape statute, before the 1980 amendment,[226] dealt with sexual intercourse between a previously chaste female victim under the age of eighteen and a male perpetrator over the age of eighteen.[227] Under the prior provisions, an eighteen year old boy who had sexual intercourse with his previously chaste seventeen year old girlfriend was subject to criminal prosecution for violation of the

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of previously chaste character younger than himself and over twelve (12) and under eighteen (18) years of age, upon conviction, shall be punished either by a fine . . . or by imprisonment . . . or by both . . . ." For the text of the amended statute, see note 217 *supra*.

[223] *See* note 215 *supra*.

[224] *See, e.g.*, People v. Salinas, 191 Colo. 171, 551 P.2d 703, 706 (1976) (conviction under statutory rape statute constitutional since statute was based on reasonable differentiation of the physiological differences between the sexes); People v. Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732, 738 (Westchester County Ct. 1976) (statutory exemption of females as possible perpetrators of rape constitutional because of physical differences between the sexes); Stewart v. State, 534 S.W.2d 875, 876-77 (Tenn. Crim. App. 1975) (rape statute which differentiates between sexes on basis of physiological differences is constitutional).

[225] *See, e.g.*, Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976) (rejecting equal protection attack on disparate penalties in statutory rape statute); Finley v. State, 527 S.W.2d 553, 556 (Tex. 1975) (upholding rape conviction against attack under state equal rights amendment).

[226] MISS. CODE ANN. § 97-3-67 (1972) (amended 1980). *See* note 222 *supra*.

[227] MISS. CODE ANN. § 97-3-67 (1972) (amended 1980).

statutory rape law. However, in the reverse situation there was no criminal violation.

When confronted with such an equal protection defense, most courts have upheld their states' statutory rape laws.[228] Generally, courts have agreed that minors, whether males or females, may suffer psychological injury from sexual intercourse. However, even employing the judicial review standard of a substantial relationship,[229] the courts have concluded that the sex classification serves the important governmental purpose of protecting females from unwanted pregnancies.[230]

Meloon v. Helgemoe[231] was a notable exception to the general trend. In this habeas corpus appeal, the First Circuit Court of Appeals reviewed the constitutionality of New Hampshire's statutory rape law. Applying the *Craig v. Boren* criteria of a "fair and substantial relation" between the state's interest and the statute's purpose,[232] the court analyzed New Hampshire's four justifications for its classification.[233] Two reasons related to the large potential victim pool and the relatively small class of potential offenders.[234] These two rationales were summarily rejected by the court as not substantial under the *Craig v. Boren*

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[228] *See, e.g.*, State v. Gray, 122 Ariz. 445, 595 P.2d 990, 992 (1979) (upheld constitutionality of statutory rape statute since it served an important governmental purpose); People v. McKellar, 81 Cal. App. 3d 367, 146 Cal. Rptr. 327, 331 (1978) (substantial relationship to the legislative purpose of preventing pregnancy in females under 18); State v. Brothers, 384 A.2d 402, 404-05 (Del. Super. Ct. 1978) (classification according to sex was reasonable); State v. Rundlett, 391 A.2d 815, 819 (Me. 1978) (served important state objective of protecting young females from physical injury and pregnancy); State v. Thompson, 392 A.2d 678, 680 (N.J. Super. Ct. Law Div. 1978) (reasonably related to valid state interest of protecting the mental and physical well-being of young females).

[229] *See* note 14 *supra*.

[230] *See* note 228 *supra*.

[231] 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

[232] *See* note 14 *supra*.

[233] 564 F.2d at 605.

[234] The state maintained:

> (1) part of the class of males under the age of 15, pre-pubescent males, are physiologically incapable of becoming victims of this consensual offense; therefore the class of victims vulnerable to women offenders is smaller than the class of victims vulnerable to male offenders; (2) adult males, due to a psychological disorder known as pedophilia or otherwise, are more likely to seek to commit the offense than adult women; therefore, the class of potential male offenders is larger than the class of potential women offenders . . . .

Id.

test.[235] The third argument, prevention of physical injury resulting from sexual intercourse, and the fourth argument, prevention of pregnancy,[236] were dismissed as hindsight justifications for the statute. As noted by the court, New Hampshire offered no evidence that these latter two reasons were in fact the purpose of the statutory rape law.[237] Therefore, the court held that the gender distinction in the statute was unconstitutional.[238]

State courts since *Meloon* generally have not used its analytical approach. In *Ex parte Groves*,[239] the Texas Court of Criminal Appeals explicitly rejected such an analysis, but nevertheless extended Texas statutory rape law to male and female offenders.[240] This decision was based on a Texas Criminal Code provision which permitted statutory interpretation of "he" as "she" and "male" as "female" in statutes.[241]

The precise issue was finally addressed by the United States Supreme Court in 1981. The Court in *Michael M. v. Superior Court*[242] held that California's statutory rape provision was not constitutionally impaired. In a plurality opinion, the Court applied the *Craig v. Boren* test and found that the statute was substantially related to a legitimate state purpose, preventing teenage pregnancies.

If one legislative purpose for Mississippi's statutory rape provision is the prevention of unwanted pregnancies, as was successfully urged by California in *Michael M.*, the statute's requirement that the victim have been previously chaste[243] renders

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[235] *Id.* at 606. *See* note 14 *supra.*

[236] The state set forth the following arguments:

> (3) female children are more likely to suffer physical damage during the commission of the offense than are male children; thus the class of female victims is in danger of more severe injury than their male counterparts; (4) only female victims may become pregnant; thus again the class of female victims may suffer more severe repercussions from the offense than will their male counterparts.

564 F.2d at 605.

[237] *Id.* at 607.

[238] *Id.* at 609.

[239] 571 S.W.2d 888 (Tex. Crim. App. 1978).

[240] *Id.* at 892-93.

[241] TEX. PENAL CODE ANN. tit. 5, §§ 19, 20 (Vernon 1974).

[242] 101 S. Ct. 1200 (1981).

[243] *See* note 217 *supra.*

such an argument curious. Pregnancy is not limited to previously chaste females. The Mississippi Legislature, by amending the statute, defused some potential equal protection defenses to statutory rape prosecutions. However, the statute apparently is still subject to a constitutional challenge because of the requirement of the victim's chastity. Another statute, assault with intent to ravish, similarly protects only previously chaste females,[244] and therefore, bears the seeds of a constitutional challenge.

2. Forcible Rape and Sodomy Statutes

Male victims remain unprotected by the common law rape statute. The judicial requirement of penetration,[245] coupled with the statutory reference to a "female" victim,[246] adds a distinctive sex-bias to the crimes of rape and sodomy.[247] Penetration of the victim's body is a necessary element of the crime of rape of a female over the age of twelve years.[248] However, if the female victim is under the age of twelve years, the statute explicitly provides that penetration is not a necessary element of the offense, although the prosecution still must prove that the female victim's private parts have been torn or lacerated.[249] Under these provisions, equal protection problems may exist in cases in which males are victims of sex crimes.

Only those males or females victimized by males may claim protection under the Mississippi unnatural intercourse statute,

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[244] MISS. CODE ANN. § 97-3-71 (1972) provides:

> Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

[245] *See* note 248 *infra*. Note the definition of "penetration" in the sexual battery act, note 218 *supra*. However, this definition appears to be restricted to the sexual battery statute by § 97-3-103, note 218 *supra*.

[246] *See* note 216 *supra*.

[247] The sexual battery statute does not contain such a bias. *See* note 218 *supra*.

[248] *See* Lang v. State, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956) (construing MISS. CODE ANN. § 2358 (1942), now MISS. CODE ANN. § 97-3-65 (Supp. 1980)) (penetration held necessary element of rape).

[249] *See* note 216 *supra*.

and even this protection is limited.[250] Males victimized by women are protected only by the sexual battery law.[251] In 1955, the Mississippi Supreme Court in *State v. Davis*[252] held that penetration per os or per anum was prohibited by the sodomy statute.[253] The *Davis* principle was reiterated in the federal appeals court's decision in *Mississippi Gay Alliance v. Goudelock*.[254] These cases demonstrated that a violation of the Mississippi sodomy statute could occur by penetration per os or per anum by the male sexual organ.[255]

The Mississippi Supreme Court has never determined whether a woman could be an offender under the sodomy statute. Favoring equal application to offenders of either sex is the statute's use of the word "person."[256] Disfavoring equal application to offenders of either sex is the court's determination in *State v. Hill*[257] that penetration by the offender is a necessary element of the offense.[258]

In *State v. Hill,* the Mississippi Supreme Court affirmed a circuit court's sustaining of a demurrer to an indictment. The Mississippi Supreme Court agreed that the indictment, by failing to state penetration, did not charge an offense under the sodomy statute.[259] Under the *Hill* requirement of penetration by the offender, a woman could never be prosecuted under the sodomy statute for forcing a man to commit such an oral act on her

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[250] *See* notes 252 through 260 and accompanying text *infra.*

[251] *See* note 218 *supra.*

[252] 223 Miss. 862, 79 So. 2d 452 (1955).

[253] *Id.* at 864, 79 So. 2d at 452. The indictment read: "[Defendant] did wilfully and feloniously commit the detestable and abominable crime against nature by having unnatural carnal intercourse with one (name omitted), a female person, by inserting his private sexual organs into her mouth and having her to suck them, he being . . . a male person . . . ." *Id.*, 79 So. 2d at 452.

[254] 536 F.2d 1073, 1075 (5th Cir. 1976), *cert. denied,* 430 U.S. 982 (1977).

[255] *Cf.* State v. Mays, 329 So. 2d 65, 65-66 (Miss. 1976) (court noted that crimes against nature traditionally included sodomy, bestiality, buggery, fellatio and cunnilingus), *cert. denied,* 429 U.S. 864 (1976).

[256] *See* note 219 *supra.*

[257] 179 Miss. 732, 176 So. 719 (1937).

[258] *Id.* at 735, 176 So. at 720.

[259] *Id.*, 176 So. at 720. That demurrable indictment read: "[D]id then and there wilfully and unlawfully and feloniously commit the detestable and abominable crime against nature by having unnatural carnal intercourse with Fannie Walker, a female human by sucking her private sexual organs with his mouth, [defendant] being a male."

body. Nor does the statute prohibit sexual acts committed orally by the perpetrator, regardless of whether the victim is male or female. This definition leaves persons such as the victim in *Hill* unprotected by either the rape statutes or the sodomy statutes, although the recently enacted sexual battery statute should provide protection.[260]

Many sister jurisdictions have filled this void of protection by finding penetration regardless of whether the sexual organ is that of the perpetrator or that of the victim.[261] That definition of sodomy protects victims in the following situations: (1) male offender and male victim; (2) male offender and female victim; (3) female offender and male victim. However, it does not protect female victims of female offenders. Since prevention of psychological harm is the common justification for these statutes, legislative acts extending protection to all persons seem both appropriate and necessary. The sex-neutral sexual battery statute recently adopted in Mississippi retains a penetration requirement, but defines penetration broadly, and, therefore, may be applicable to female offenders of female victims.[262]

E. Prostitution Statutes

Although the Mississippi prostitution statute[263] is sex-neu-

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[260] *See* note 218 *supra*.

[261] *See, e.g.*, State v. Maida, 29 Del. (6 Boyce) 40, 96 A. 207, 208 (1915) (use of any unnatural bodily opening for copulation constitutes sodomy); Comer v. State, 21 Ga. App. 306, 94 S.E. 314, 314 (1917) (female defendant convicted of sodomy for having cunnilingus performed on her by a male); Jones v. State, 17 Ga. App. 825, 88 S.E. 712, 713 (1916) (carnal knowledge may be had by use of the mouth of the defendant); Glover v. State, 179 Ind. 459, 101 N.E. 629, 632 (1913) (legislative intent was to punish sodomy in any form); State v. Simpson, 243 Iowa 65, 50 N.W.2d 601, 603 (1951) (defendant may commit the crime of sodomy by using mouth alone; no penetration by defendant's sexual organ necessary); State v. Guerin, 51 Mont. 250, 152 P. 747, 748 (1915) (common sense dictates that the mouth, as well as the anus, can be used to commit crime of sodomy); *Ex parte* Benites, 37 Nev. 145, 140 P. 436, 436 (1914) (sodomy statute covers entire field of unnatural acts); State v. Start, 65 Or. 178, 132 P. 512, 513 (1913) (statute did not specify into which "opening" penetration must be made); State v. Whitmarsh, 26 S.D. 426, 128 N.W. 580, 583 (1910) (sodomy statute includes every unnatural carnal copulation). *But see, e.g.*, Sledge v. State, 142 Neb. 350, 6 N.W.2d 76, 77 (1942) (fact that sexual organ of complaining witness was involved precluded sodomy conviction; no penetration on the part of defendant).

[262] *See* note 218 *supra*.

[263] MISS. CODE ANN. § 97-29-49 (1972) provides:

tral, it nonetheless lends itself to sex discrimination. Since the word "person" is used throughout, rather than the words "male" or "female," the statute cannot be construed as unconstitutional. By its terms it should be applicable to prostitutes of either sex,[264] as well as their customers.[265] However, because of prosecutorial discretion in enforcing the statute, the statute may subtly discriminate against women. Homosexual male prostitutes are likely to be prosecuted under the sodomy statute,[266] rather than the prostitution statute. Heterosexual male prostitutes, in order to be prosecuted at all, probably must be charged with violation of the prostitution statute.[267] However, men are rarely prosecuted either as customers of prostitutes or as prostitutes themselves.[268]

Although the prostitution statute is sex-neutral in its wording, the procurement statute[269] suggests that the prostitution

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It shall be unlawful to engage in prostitution or to aid or abet prostitution or to procure or solicit for the purposes of prostitution, or to reside in, enter, or remain in any place, structure, or building, or to enter or remain in any vehicle or conveyance for the purpose of lewdness, assignation, or prostitution, or to keep or set up a house of ill-fame, brothel or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure or building, or to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building, or to direct, take, or transport, or to offer or agree to take or transport, or aid or assist in transporting, any person to any vehicle, conveyance, place, structure, or building, or to any other person with knowledge or reasonable cause to know that the purpose of such directing, taking or transporting is prostitution, lewdness or assignation, or to lease or rent or contract to lease or rent any vehicle, conveyance, place, structure, or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited, or to aid, abet, or participate in the doing of any of the acts herein prohibited.

[264] *See* 47 MISS. L.J. 279, 300 (1976) (court has never construed prostitution statute as applying only to females).

[265] *See, e.g.*, Sledge v. State, 142 Neb. 350, 6 N.W.2d 76, 77 (1942) (under aiding, abetting, or procurring sections).

[266] *See* note 219 *supra.*

[267] *See* note 263 *supra.*

[268] The female prostitute is a "more visible target for law enforcement." Comment, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CAL. L. REV. 1235, 1281 (1976). Over a two year period in two cities, of 3,287 persons arrested for violations involving heterosexual prostitution, 3,163 were female. *Id.* at 1278.

[269] *See* note 271 *infra.*

statute[270] is directed primarily against female prostitutes. The procurement statute[271] prohibits only procurement of a female for purposes of prostitution and contains no sanctions against similar procurement of a male.

The equal protection arguments discussed in the statutory rape section[272] might also be applicable to the Mississippi procurement statute. The central inquiry is whether the gender classification bears a substantial relation to the state's interest. Although it is difficult to justify the gender-based classification using the test in *Craig v. Boren,*[273] particularly when the analysis of the *Meloon* case is used,[274] the state might defend the classification as protection to the class more likely to be physically injured,[275] an argument similar to California's successful argument in *Michael M.*[276]

Conclusion

Although Mississippi has progressed toward elimination of statutory sexism, the job is not completed. In the labor field, woman's role as an economic creature must be fully recognized in order for her to have full economic equality. Economic discrimination against women denies the state and its citizenry the maximum use of the talents and skills of a major portion of its population. The legislature, by enacting statutes promoting economic

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[270] *See* note 263 *supra.*

[271] Miss. Code Ann. § 97-29-51 (1972) provides:

It shall further be unlawful to procure a female inmate for a house of prostitution, or to cause, induce, persuade, or encourage by promise, threat, violence, or by scheme or device, a female to become a prostitute or to remain an inmate of a house of prostitution, or to induce, persuade, or encourage a female to come into or leave this state for the purpose of prostitution, or to become an inmate in a house of prostitution, or to receive or give, or agree to receive or give any money or things of value for procuring, or attempting to procure any female to become a prostitute or an inmate in a house of prostitution, or to knowingly accept, receive, levy or appropriate any money or other thing of value without consideration from a prostitute or from the proceeds of any woman engaged in prostitution.

[272] *See generally* notes 226 through 244 and accompanying text *supra.*

[273] *See* note 14 *supra.*

[274] *See* notes 231 through 238 and accompanying text *supra.*

[275] *See* note 228 *supra.*

[276] *See* note 242 and accompanying text *supra.*

equality, ensures the fuller future development of human potential. Conversely, any sexually discriminatory statutes in the economic sphere bar women from total participation in society.

In the criminal area, inequality in the law deprives the state of successful prosecution of either male or female wrongdoers. If Mississippi is to ensure adequately its citizens' safety and to punish criminals effectively, its criminal statutes must conform to the requirements of the United States Constitution. Without such conformity, the state only guarantees to the criminal defendant a valid fourteenth amendment defense.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 51 JUNE-SEPTEMBER 1980 NUMBER 2

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COMMENT

GUARDIANSHIPS AND CONSERVATORSHIPS OVER PERSONS AND ESTATES IN MISSISSIPPI

The purpose of this article is to explain the procedure for establishing, maintaining, and terminating guardianships and conservatorships in Mississippi. A guardian is a person appointed by the court to protect the interests of one who, because of infancy,[1] unsoundness of mind,[2] alcoholism, drug addiction, a felony conviction, or some other legal disability,[3] is unable to do so himself.[4] A person thus protected is termed a ward.[5] In Mississippi, one can be appointed as guardian of both the ward and his estate, of the ward's estate only, or of the ward only,[6] but all guardians are general guardians[7] to the extent of their appointment.

Loss of memory or understanding due to old age is not deemed to be a legal disability.[8] Instead, when a person cannot

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[1] Infant, as defined by MISS. CODE ANN. § 1-3-21 (1972), and minors, as defined by § 1-3-27, are all persons under 21 years of age. In certain situations, the disability of minority is removed before age 21. *See, e.g., id.* § 93-19-11 (removing disability of married minor for suits involving marital rights).

[2] Persons of unsound mind include "idiots, lunatics, and persons non compos mentis." *Id.* § 1-3-57.

[3] The preceding are the stated legal disabilities, but the list is not exhaustive. *Id.* § 1-3-58 (Supp. 1980).

[4] Prudential Ins. Co. v. Gleason, 185 Miss. 243, 271, 187 So. 229, 232 (1939) (partition suit by minor child acting as guardian of her brother and sisters after having disability of minority removed).

[5] MISS. CODE ANN. § 1-3-58 (Supp. 1980).

[6] *Id.* § 93-13-15.

[7] The concept of limited guardianships, as opposed to general guardianships, is now gaining recognition in some states. A limited guardianship recognizes that there are different degrees of disability requiring different amounts of supervision. *See* WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1980-81) (granting superior court power to appoint limited guardians of disabled, incompetent, or minor persons).

[8] Scott v. United States, 190 F.2d 134, 136 (5th Cir. 1951). Neither is a person deemed to be under a legal disability solely because of eccentric acts. The test of a legal

manage his own estate because "of advanced age, physical incapacity or mental weakness" but is under no legal disability, a conservator[9] can be appointed to manage the estate.[10] In certain instances, a conservator can also be appointed to take custody of the person.[11]

I. JURISDICTION AND VENUE

The chancery court, historically the superior guardian of all infants and persons of unsound mind,[12] now has both statutory[13] and constitutional[14] jurisdiction over all matters pertaining to these persons.[15] In the exercise of this jurisdiction, the court controls all litigation on behalf of or against the ward[16] and can

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disability "is the ability to know and understand the nature, character and effect of one's acts." *Id.*

[9] Both guardians and conservators are fiduciaries. MISS. CODE ANN. §§ 27-7-3(d), 91-11-3(d) (1972). A fiduciary relationship is one in which a person has the confidence of another and, as a result, influence over him. Wofford v. Wofford, 244 Miss. 442, 456, 142 So.2d 188, 194 (1962) (action for reformation of deed).

[10] MISS. CODE ANN. § 93-13-251 (1972).

[11] *Id.*

[12] Union Chevrolet Co. v. Arrington, 162 Miss. 816, 826, 138 So. 593, 595 (1932) (suit seeking to overturn guardian's settlement of ward's wrongful death claim); *see* Martin v. DeJarnette, 185 Miss. 76, 82, 187 So. 202, 203 (1939) (an insane person is the ward of the chancery court). Since the chancery court has long had the discretionary authority to appoint guardians, the court's appointments are difficult to overturn. Spaun v. Collins, 18 Miss. (10 S. & M.) 624, 625 (1848) (petition by ward's uncle to be appointed guardian and to have a stranger removed).

[13] *See* MISS. CODE ANN. § 9-5-141 (Supp. 1980) (granting chancery clerk power to handle business of minors and persons of unsound mind). The chancery clerk may appoint guardians for persons of unsound mind, minors, and convicted felons, and make all orders and issue all process necessary for the collection and preservation of their estates. *Id.*

[14] *See* MISS. CONST. art. 6, § 159 (granting chancery court full jurisdiction over business of minors and persons of unsound mind).

[15] *In re* Heard's Guardianship, 174 Miss. 37, 41-42, 163 So. 685, 686 (1935) (petition asking that decree naming petitioner as guardian be set aside); *see* Mabrey v. Hoye, 124 Miss. 144, 152, 87 So. 4, 4 (1921) (suit by sheriff to obtain custody of incompetent in Mississippi Insane Hospital).

[16] Newsom v. Federal Land Bank, 184 Miss. 318, 340, 185 So. 595, 602 (1938) (suit on behalf of ward against guardian to recover damages caused by guardian's alleged negligence in running the guardianship). This includes all litigation which affects the guardianship, suits between the guardian and ward, suits between the guardian and third persons, and suits against the guardian for causes of action against the ward. *Id.*, 185 So. at 602.

supervise the management of the guardianship.[17] It is within the chancery court's discretion to determine what is most advantageous to the ward and to order that the guardianship be managed acccordingly.[18]

The chancery court of the county of an incompetent's residence has jurisdiction to appoint a guardian for the incompetent.[19] Exclusive jurisdiction to appoint a guardian for a minor is vested in the court of the county in which the minor resides at the time of his parent's death, if the minor has no property in another county.[20] The chancery court of the county in which property of a nonresident is located can appoint a guardian of the nonresident's estate.[21]

Venue for all suits involving a guardian's performance in managing the ward's estate, including the guardian's accounts and settlement, is the county in which the guardian is appointed.[22]

II. Establishing the Guardianship

A. *Guardianships of Minors*

Chancery courts assume jurisdiction over minors only when

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[17] *Id.* at 337, 185 So. at 600. The court can inquire into whether the guardian has acted diligently in managing the guardianship, including the ward's property. *Id.* at 337-38, 185 So. at 601. The chancellor is not personally bound to make such an inquiry, but may appoint assistants as they are needed. *Id.* at 337, 185 So. at 600-01.

[18] Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 479, 162 So. 2d 874, 877 (1964) (suit for specific performance of option, granted by the guardian, to sell incompetent's property).

[19] Miss. Code Ann. § 93-13-13 (Supp. 1980). If the incompetent has an estate, the court can appoint a general guardian over the person, the estate, or both the person and estate. If the incompetent has no estate, the court can appoint a general guardian only over the person. *Id.*

[20] *In re* Guardianship of Watson, 317 So. 2d 30, 32 (Miss. 1975) (grandmother of children whose parents were killed applied for appointment as guardian).

[21] Duke v. State, 57 Miss. 229, 231 (1879) (suit by ward, a resident of Tunica County, on bond of guardian who was appointed in Pontotoc County). This power pertains to persons in other states adjudged to be of unsound mind or to Mississippi residents confined in out-of-state insane asylums. The chancery court of a county where a debt is due or cause of action exists may also appoint such a guardian. Miss. Code Ann. § 93-13-123 (1972).

[22] Miss. Code Ann. § 11-5-1 (1972).

there is a failure of the natural guardianship.[23] If both parents are living, they act jointly as the natural guardians of their minor children[24] and share equal responsibility for protecting, educating,[25] and maintaining them.[26] If either parent dies or becomes incapable of acting as guardian, the surviving parent, if suitable,[27] becomes the sole guardian.[28] If there is a living parent

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[23] Kilgrow v. Kilgrow, 268 Ala. 82, 107 So. 2d 885, 888-89 (1959) (court applied rule to disavow jurisdiction over husband's request for injunctive relief from wife's interference with their child's education). The natural guardianship can fail because of divorce, separation, parental neglect, or the parent's "incapacity, unfitness or death." 107 So.2d at 888.

[24] MISS. CODE ANN. § 93-13-1 (1972).

[25] *Id.* The Mississippi Supreme Court has concluded that the principal duties owed by parents to their children are those of protection, maintenance, and education. Education includes both moral and intellectual training. *In re* Faust's Guardianship, 239 Miss. 299, 307, 123 So. 2d 218, 220 (1960) (appeal from decree ordering father to leave his children in certain school and to allow them to attend the church of their choice). Courts cannot interfere with the education of children whose parents have not forfeited the right to control the children's education. *Id.* at 305, 123 So. 2d at 219, 220.

A father has a duty to send his qualified children to college if he is financially able to do so. Pass v. Pass, 238 Miss. 449, 455, 118 So. 2d 769, 771-72 (1960) (petition by divorced wife for increase in child support). This duty is not absolute, however, but depends instead on whether the child's behavior "makes the child worthy of the additional effort and financial burden that will be placed on the father." Hambrick v. Prestwood, 282 So. 2d 474, 477 (Miss. 1980) (court decreed that divorced father had no duty to pay for daughter's college education because she intensely disliked him and had refused contact with him).

[26] MISS. CODE ANN. § 93-13-1 (1972). Parents are also jointly responsible for the management of the estates of their minor children. Additionally, parents are statutorily liable, in an amount not to exceed $1,000, for damage to the property of others committed by the malicious and wilful acts of their children between the ages of 10 and 18. *Id.* at § 93-13-2(1) (Supp. 1980). The statute provides that the authorized action is in addition to any other available remedies. *Id.* § 93-13-2(2). The statutory purpose is to allow recovery from parents where such recovery would otherwise be unavailable. *Id.* § 93-13-2(3). The statute does not, however, "apply to parents whose parental custody and control of such child have been removed by court order or decree." *Id.* § 93-13-2(1) (Supp. 1980).

[27] *See, e.g.*, Simpson v. Rast, 258 So. 2d 233, 236 (Miss. 1972) (court applied rule to allow suitable father to recover custody of his children from the husband of his deceased ex-wife); Hosey v. Myers, 240 So. 2d 252, 253 (Miss. 1970) (unsuitable father not entitled to custody after death of divorced wife); Mitchell v. Powell, 253 Miss. 867, 884, 179 So. 2d 811, 819 (1965) (suitable father entitled to custody of child as against relatives of deceased ex-wife); Kinnaird v. Lowery, 102 Miss. 557, 562, 59 So. 843, 844 (1912) (suitable surviving mother entitled to custody as against grandmother with whom the children wished to remain). The Mississippi Supreme Court has stated that a parent is unsuitable to act as a guardian upon "a clear showing . . . that the conduct of the parent is so immoral as to be detrimental to the child, or . . . that the parent is unfit mentally or

who is suitable, a court-appointed guardian is not entitled to custody of the child.[29]

The law strongly prefers that children be left in the custody of one or both parents[30] and presumes that natural parents will most effectively promote their child's best interests.[31] Consequently, one seeking to remove a child from the custody of his parents has the burden of proving either that the parents are not suitable guardians[32] or that they have abandoned the child.[33] The child's welfare is the most important consideration to a court[34] in awarding custody.[35]

If a minor's parents are separated, the court may appoint either as guardian,[36] and if both are suitable neither has prefer-

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otherwise to have the custody of his or her child." Simpson v. Rast, 258 So. 2d 233, 236 (Miss. 1972).

[28] MISS. CODE ANN. § 93-13-1 (1972).

[29] *Id.* § 93-13-5 (Supp. 1980). Therefore, if a guardian is appointed for a child who has a suitable parent, the parent is entitled to custody of the child and the guardian is entitled to manage the child's estate. McDowell v. Bonner, 62 Miss. 278, 279-80 (1884) (petition by minor's aunt to be appointed guardian even though the child's father was living).

[30] Mahaffey v. Mahaffey, 176 Miss. 733, 740, 170 So. 289, 292 (1936) (court recognized policy, but committed incorrigible minor child to state training school because divorced mother was unable to control the child).

[31] Hibbette v. Baines, 78 Miss. 695, 703, 29 So. 80, 81 (1900) (suitable father awarded custody as against maternal relative whom his ex-wife had appointed upon her death).

[32] *See* note 27 *supra*. Also, a parent may be unsuitable if unwilling or unable to control the child to the extent that, due to immorality or delinquency, the child obviously is in serious danger of becoming an unacceptable member of society. Mahaffey v. Mahaffey, 176 Miss. 733, 740, 170 So. 289, 292 (1936) (appeal from enforcement of decree committing minor child to state industrial training school).

[33] Hibbette v. Baines, 78 Miss. 695, 703, 29 So. 80, 81 (1900). Even though a parent may otherwise be suited to have custody of a child, the parent is not entitled to custody if the child has been abandoned. *Id.*

[34] A guardian may be appointed by either the court or the chancellor in vacation. MISS. CODE ANN. § 93-13-1 (1972). The court cannot remove a child from the custody of his parents without first giving them notice of the custody hearing and an opportunity to be heard at the hearing. Britt v. Allred, 199 Miss. 786, 789, 25 So. 2d 711, 712 (1946) (decree granting custody to another was void since no notice was given to persons standing *in loco parentis* to the minor).

[35] Forbes v. Warren, 184 Miss. 526, 532-33, 186 So. 325, 326 (1939) (custody awarded to maternal grandparents despite suitable father, since in best interest of the child). Important elements in determining what is in the child's best interest are the sex, age, physical condition, and wishes of the child. *Id.*, 186 So. at 326.

[36] MISS. CODE ANN. § 93-13-3 (1972). The state in which the parent having lawful

ence.[37] As in other contests for custody of a minor child, the court's chief concern is the welfare of the child.[38] When custody is awarded to the mother, however, the father continues to be obligated to support his minor child.[39]

A parent may appoint a testamentary guardian for a minor child, and may do so even if the child is under another disability.[40] A parent may also appoint a testamentary guardian for an adult child who is under a legal disability.[41] This appointment is ineffective, however, if the other parent is still living.[42] After a testamentary guardian is qualified,[43] he has the same rights, liabilities, and duties as a guardian appointed by the court.[44]

If a testamentary guardian is not appointed, or has been ap-

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custody resides has jurisdiction over the guardianship. *Id.*

[37] Bland v. Stoudemire, 219 Miss. 526, 531, 69 So. 2d 225, 227 (1954) (petition by mother for custody of her child after divorce); Boswell v. Pope, 213 Miss. 31, 37, 56 So. 2d 1, 3 (1952) (same).

[38] *See* note 35 and accompanying text *supra;* Shoffner v. Shoffner, 244 Miss. 557, 562, 145 So. 2d 149, 151 (1962) (petition by mother seeking increased child support and cross bill by father seeking custody of the children); Bland v. Stoudemire, 219 Miss. 526, 531, 69 So. 2d 225, 227 (1954) (mother's custody petition); Boswell v. Pope, 213 Miss. 31, 37, 56 So. 2d 1, 3 (1952) (same).

[39] Pass v. Pass, 238 Miss. 449, 456, 118 So. 2d 769, 772 (1960) (petition by divorced wife for increase in child support from father).

[40] MISS. CODE ANN. § 93-13-7 (Supp. 1980). The instrument creating the guardianship takes effect upon the death of the parent. To be effective, however, the instrument must be either wholly written and signed by the parent, or, if not wholly written, must be attested to by two or more credible witnesses, other than the appointed guardian. *Id.*

[41] *Id.* Prior to the amendment of MISS. CODE ANN. § 93-13-7, a parent could not appoint a testamentary guardian for an adult child, even if under another disability. *See, e.g.,* Jones v. Parker, 216 Miss. 64, 68, 61 So. 2d 681, 682 (1952) (contesting decree granting recovery for incompetent of money owed by prior guardian, but not allowing interest).

[42] *See* Campbell v. Mansfield, 104 Miss. 533, 547, 61 So. 593, 593 (1913) (appointment of testamentary guardian held ineffective because mother of children was still living). A guardian so appointed becomes trustee over the property devised and bequeathed to the children and over which the testator showed a clear intent for the guardian to manage. *Id.,* 61 So. at 593.

[43] A guardian appointed in a will must appear before the chancery court and give written acceptance of the guardianship. The instrument of appointment, which may be contested in the same manner as a will, and the acceptance are recorded in the records of wills. If the guardian fails to qualify within three months of his gaining the right of guardianship, or earlier if the court so directs, the guardian will be summoned to accept or renounce the guardianship. The court will appoint someone else if the guardian fails to appear, fails to qualify, or renounces. MISS. CODE ANN. § 93-13-9 (Supp. 1980).

[44] *Id.* § 93-13-11.

pointed but does not qualify, the chancery court may appoint a guardian for the minor.[45] The court must give preference, however, to the natural guardian or next of kin,[46] who has a legal right to be appointed guardian[47] unless manifestly unsuited to care for the minor and his estate.[48] If a suitable relative applies, the court has a duty to remove a stranger who has been appointed.[49] Notice must be given to the next of kin[50] before a guardian is appointed by the court, so that the most qualified

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[45] *Id.* § 93-13-13 authorizes the court to appoint a general guardian over the estate, or person and estate, of a minor having either real or personal property. Personal property includes a minor's claims for damages arising out of tort. Gunter v. Henderson Molpus Co., 149 Miss. 603, 616, 115 So. 720, 722 (1928) (suit for wrongful death of child).

[46] MISS. CODE ANN. § 93-13-13 (Supp. 1980).

[47] Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (removal of relative as guardian of minor and appointment of the minor's mother). Courts prefer to appoint one person to serve as guardian of both the minor and his estate, especially when the minor's parent acts as guardian. *Id.*, 133 So. at 605.

[48] Allen v. Peete, 25 Miss. 29, 31 (1852) (minors' uncle appealed awarding of their guardianship to a stranger). Such a relative is preferred, however, over an equally suited stranger. *Id.*

[49] Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (suit by ward's mother for removal of court-appointed guardian and appointment of herself); Spaun v. Collins, 18 Miss. (10 S. & M.) 624, 626 (1848) (petition by ward's uncle to be appointed guardian and to have stranger removed).

[50] Under MISS. CODE ANN. § 93-13-281 (Supp. 1980), the parent or parents of the ward must be joined as defendants. If neither parent is living, two of the ward's adult kin within the third civil law degree must be joined as defendants. Process is issued as in other suits.

If the ward has been legally adopted, the adoptive parents must be joined. If custody of the ward has been awarded to one natural parent, however, only that parent need be joined.

A guardian *ad litem* will be appointed at the court's discretion if there are no adult kin within the third civil law degree. Service of process is not needed if the parent or parents join in the petition with the guardian. If the parents are not living, no service is necessary if two adult kin within the third civil law degree join in the petition. No one must be made a defendant if the ward has no living parent, kin within the third degree whose place of residence is known by the ward, or next friend.

If the ward has been legally adopted, the adoptive parents or next of kin can join with the guardian in the petition in place of the natural parents. If custody of the ward has been awarded to one natural parent, only that parent need join with the guardian in the petition.

If the ward is married, the ward's spouse, if 21, and one other adult kin within the third civil law degree may be joined as defendants or join in the petition. The spouse, if under 21, and two adult kin within the third civil law degree may join as defendants or join in the petition. *Id.*

person can be appointed.[51] Although a minor over fourteen years of age and under no other disability may be allowed by the court to select a general guardian,[52] the selection will prevail only if the court finds that the person selected is suitable. If the person selected is unsuitable, the court can appoint someone else.[53] If no one qualifies, the chancery clerk will be appointed by the chancery court and act under its direction.[54]

B. Guardianships of Adults

The chancellor can appoint a guardian for adult persons who need mental treatment[55] and are incapable of caring for themselves or their property. Such a guardian may be appointed either by motion of the chancellor or the chancery clerk, or by petition of any relative, friend, or interested party.[56] The prefer-

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[51] *In re* Guardianship of Watson, 317 So. 2d 30, 33 (Miss. 1975) (grandmother applied for appointment as guardian of orphaned grandchildren).

[52] MISS. CODE ANN. § 93-13-13 (Supp. 1980). Such a minor can select a guardian of the person or estate, but the guardian must be a resident of the county where the guardianship proceedings are pending. If the guardian selected is a resident of another county, the proceedings are moved to the guardian's county of residence and the minor becomes a resident of that county. If the minor fails to select a guardian, or the guardian selected fails to qualify, the court will select a guardian. *Id.* A minor, upon reaching the age of 14, can select a guardian even though one has previously been appointed by the court, unless the previously appointed guardian's authority is derived from a will. Sessions v. Kell, 30 Miss. 458, 464 (1855) (orphan, upon reaching 14, petitioned to have court appointed guardian removed and the orphan's brother appointed).

[53] Maskew v. Parker, 127 Miss. 160, 164-65, 89 So. 909, 910 (1921) (suit contesting appointment of guardian selected by ward who was over 14 years old).

[54] MISS. CODE ANN. § 93-13-21 (Supp. 1980). The clerk is liable, as are other guardians, except that he is not bound to incur any costs. The clerk must post a special cumulative bond as guardian, and his official bond also covers his liability as guardian. When the clerk's term expires, he must make a final settlement and deliver the ward's property to the successor guardian or other person designated by the court. The clerk is allowed a maximum of 10% of the estate as a commission on final settlement. *Id.*

[55] MISS. CODE ANN. § 41-21-61(c) (Supp. 1980) provides that:

> Person in need of mental treatment . . . means any person afflicted with mental illness if that person, as a result of such mental illness, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury, or to provide for his own physical needs. "Mental illness," as employed in this definition, does not include mental retardation.

[56] *Id.* § 93-13-111. If the chancellor appoints a guardian, costs of the proceedings are paid out of the ward's estate. If no guardian is appointed, costs are paid by the person

ence for next of kin as guardians of minors[57] does not extend to the next of kin of the adult incompetent.[58] Instead, the appointment of guardians for adult incompetents and their estates is left to the discretion of the chancery court.[59] If no one else qualifies, the chancery clerk can be appointed.[60]

Under certain circumstances,[61] the chancery court of the county in which any property of a Mississippi citizen is located may appoint a guardian of that person's estate even though the person has not been or has been improperly adjudged of unsound mind.[62] Such a guardian has the same rights, duties, and liabilities as guardians of residents who have been declared legally to be of unsound mind.[63]

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bringing the proceeding. Proceedings are instituted by the filing of a sworn petition in the chancery court of the alleged incompetent's residence. The alleged incompetent is summoned to a hearing at which all interested parties can present evidence of the person's need for mental treatment. *Id.* Since § 41-21-61(c) excludes mental retardation from the definition of mental illness, a guardian for a retarded adult cannot be appointed under § 93-13-111. Such guardians are normally appointed under the court's general constitutional authority over incompetents. *See* note 14 *supra.*

[57] *See* notes 46 through 51 and accompanying text *supra.*

[58] Muse v. Muse, 76 Miss. 372, 373-74, 24 So. 168, 168 (1898) (appeal of appointment of another to be guardian of non compos mentis brought by next of kin).

[59] Pinson v. Combs, 215 So. 2d 879, 879 (Miss. 1968) (guardianship contest between adult daughters and second wife of incompetent); Muse v. Muse, 76 Miss. 372, 374, 24 So. 168, 168 (1898) (guardianship contest between next of kin and widow of incompetent's brother).

[60] Miss. Code Ann. § 93-13-129 (1972). A clerk so appointed is subject to the same provisions as he would be if appointed guardian of a minor. *Id.* For provisions for appointment of the clerk as guardian of a minor, see note 54 and accompanying text *supra.*

[61] Miss. Code Ann. § 93-13-125 (1972) applies only to persons who:

> (1) have been continuously confined in a mental hospital operated by the State of Mississippi or by the United States government within the State of Mississippi for a period of more than one year and are still so confined, (2) are of unsound mind, (3) are mentally incapable of taking care of their estates, and (4) are incapable of responding to process.

[62] *Id.* The petition for appointment may be made by any relative, friend or other interested person. If a certificate from the director of the hospital confirming the conditions alleged is attached, no process on the director or further proof is required. The guardianship may be terminated when the court is satisfied the incompetent has been restored to sanity. *Id.*

[63] *Id.* § 93-13-127.

C. Guardianships in Extraordinary Circumstances

The chancery court[64] may appoint a guardian for the person and estate of an alcoholic or habitual drug user,[65] or may direct that the alcoholic or addict be committed to an asylum.[66] A guardian may also be appointed by the court[67] for the estate of a person sentenced to prison for one year or more,[68] or for a member of the armed forces or merchant marine who is officially listed as missing in action or captured.[69]

D. Guardian Ad Litem and Temporary Guardian

The court, in its discretion,[70] can appoint a guardian *ad litem* to protect the interests of a minor or a person of unsound

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[64] A guardian may be appointed by the chancery court of the county of residence of the alcoholic or drug addict. *Id.* § 93-13-131.

[65] Drug users as referred to by the statute are those persons who habitually use cocaine, opium or morphine. *Id.*

[66] *Id.* A relative or friend of such person may petition the court to have a guardian appointed. If the court finds that there are probable grounds for appointment of the guardian, the alleged alcoholic or drug addict is summoned and a hearing is held. The court, if necessary, may appoint a guardian over both the person and estate. If a guardian is appointed, the ward's estate pays all costs. *Id.*

[67] The chancery court of the county of the person's residence or of the county in which the person owns property may appoint a guardian. *See id.* § 93-13-135 (appointment of guardians for convicts); *id.* § 93-13-161 (appointment of guardians for servicemen missing in action or captured).

[68] *Id.* § 93-13-135. The guardianship terminates when the term of imprisonment ends or when the convict dies. The guardian is then allowed a reasonable allowance for his services. *Id.*

[69] *Id.* § 93-13-161. This may be done only if the missing person has not previously appointed someone to act on his behalf. Proceedings are instituted by a petition filed by anyone authorized by law to act as guardian, and preference is given to the next of kin. The guardian has the same powers as the guardians of the estates of minors or adults, depending on whether the absentee is an adult or minor, and may be required by the court to post bond.

The court can terminate the guardianship upon the filing of a petition that is either signed by the absentee or submitted by an attorney having the power of attorney. The guardianship can also be terminated upon the death of the absentee and appointment of an executor or administrator of his estate. *Id.*

[70] Although appointment is not mandatory, a guardian *ad litem* should be appointed when the court becomes aware of the ward's incompetence. Scott v. United States, 190 F.2d 134, 136 (5th Cir. 1951) (suit to set aside condemnation of incompetent's property). *But see* M'Allister v. Moye, 30 Miss. 258, 263 (1855) (guardian *ad litem* must be appointed if guardian is personally interested in the suit so as to prejudice the minor's rights).

mind.[71] Since the language of the statute is permissive, however, the failure to appoint a guardian does not render a decree void.[72] Actual or constructive notice to the minor or person of unsound mind is necessary in order for the court to have jurisdiction to make the appointment.[73] A temporary guardian must be appointed to act as guardian during an appeal from the granting of letters of guardianship.[74]

III. Rights, Duties, Liabilities

A. Bond

Unless the requirement is dispensed with,[75] every guardian must post bond made payable to the state before he has the authority to act.[76] The court may set the amount and designate the sureties of the bond,[77] and, if the court determines the bond to be insufficient or the surety to be of doubtful solvency, it can require that a new bond be posted and that the guardian be removed if this is not done.[78]

A guardian and his sureties are liable for all assets of the ward's estate which the guardian received and for those which

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[71] Miss. Code Ann. § 9-5-89 (1972). The court may also allow the guardian *ad litem* reasonable compensation. *Id.*

[72] *Id.*

[73] M'Allister v. Moye, 30 Miss. 258, 262-63 (1855).

[74] Miss. Code Ann. § 93-13-19 (1972). The court or clerk must appoint such a guardian if there is no one qualified to act as guardian pending appeal. The temporary guardian must post bond and serves until the appeal is decided. *Id.*

[75] Bond does not have to be posted if it has been waived by will or other writing. Nor is there a bond requirement for the part of the ward's assets that are deposited at the court's discretion in a fully insured bank or savings and loan account. *Id.* § 93-13-17 (Supp. 1980).

[76] *Id.* The bond is recorded, and may be sued on even though the appointment is not legal. *Id.*

[77] *Id.*

[78] *Id.* § 93-13-23 (1972). It is left to the court's discretion to determine what can render a bond insufficient. State v. Hull, 53 Miss. 626, 644 (1876) (action on bond of surety who alleged bond was taken out without authority of law). Posting of the additional bond does not relieve the original sureties of future liability. *Id.* at 646; *cf.* notes 81 through 83 and accompanying text *infra*. The sureties of the new bond are not liable for breaches that take place prior to execution of the new bond unless they plainly manifest an intent to be so liable. Aetna Indem. Co. v. State, 101 Miss. 703, 719, 57 So. 980, 982 (1912) (suit against sureties on two bonds for recovery of funds converted to guardian's use).

he could have collected had he acted diligently,[79] but they are not liable for the ward's funds that are loaned in accordance with a court order.[80] A surety who believes that he may become liable on the bond may petition the chancery court to be discharged.[81] His right to discharge depends on a finding by the court that there is a substantial danger of loss.[82] If discharged, he remains liable for all past breaches of the bond, but is not liable for future breaches.[83]

B. Guardian's Rights and Liabilities

After the guardian qualifies, the court shall decree that the ward's property be delivered to the guardian,[84] who must then use reasonable diligence in locating and taking possession of all the ward's property in Mississippi.[85] If the guardian is appointed

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[79] *See, e.g.*, Ames v. Williams, 74 Miss. 404, 409, 20 So. 877, 877 (1896) (surety appealed from judgment of liability for funds the guardian could have collected while alive); McWilliams v. Norfleet, 63 Miss. 183, 186 (1885) (guardian liable for assets he could have collected if duties were properly discharged). If the guardian is held liable for interest, the surety is also liable for interest. State v. Hull, 53 Miss. 626, 648 (1876).

[80] Cohn v. Winslow, 115 Miss. 275, 282, 76 So. 264, 265 (1917) (suit to hold surety liable for loss of funds deposited in insolvent bank under court order). The court in *Cohn* held that even if the guardian agrees to remain liable on money deposited by court order into a bank which subsequently becomes insolvent, the surety is not liable if he made no similar agreement. *Id.*, 76 So. at 265.

[81] MISS. CODE ANN. § 93-13-23 (1972). Such a surety may also ask the court to require the guardian to execute counter security. Foster v. Bisland, 23 Miss. 296, 297 (1852) (petition by surety to be discharged).

[82] *See* MISS. CODE ANN. § 93-13-23 (1972) (procedure and reasons for removing guardian). If the court finds that the complaint is well-founded, the guardian may be required to give new bond and can be removed for failure to do so. *Id.* A surety is not entitled to be relieved of liability simply because he desires to be discharged. Coleman v. Lamar, 40 Miss. 775, 777-78 (1866) (surety's suit to require guardian to post a new bond).

[83] *See* Bell v. Rudolph, 70 Miss. 234, 240, 12 So. 153, 153 (1892) (surety held responsible for delinquencies occurring before he was relieved on his bond and new bondsmen appointed).

[84] MISS. CODE ANN. § 93-13-31 (1972). Failure of the guardian after due notice to comply with the decree is sufficient cause to sue the guardian on his bond or to attach, fine, or imprison him for contempt. *Id.*

[85] *In re* Guardianship of Horne, 178 Miss. 714, 729, 173 So. 660, 663 (1937) (suit attacking validity of guardian's final accounting). There is no duty to find out everything discoverable but only to use reasonable diligence to determine the extent of the property belonging to the ward in the state. Newsom v. Federal Land Bank, 184 Miss. 318, 339, 185 So. 595, 601 (1939).

over the ward's person, the ward has a legal duty to submit to the authority of the guardian.[86]

Section 93-13-38 of the Mississippi Code[87] states the general duties and powers of all guardians in Mississippi.[88] A guardian must use reasonable diligence to improve his ward's estate[89] and can collect and sue for debts due the ward.[90] He is also empowered to pay the debts of the ward that have been probated,[91] although no debts are payable from the ward's exempt property.[92]

The chancery court and the chancellor in vacation are au-

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[86] Keith v. Miles, 39 Miss. 442, 444 (1860) (holding void for lack of consideration a promise by guardian to pay ward's board and school tuition in order to induce the ward to return to guardian's control).

[87] MISS. CODE ANN. § 93-13-38 (Supp. 1980).

[88] MISS. CODE ANN. §§ 439-40 (1942) (current version at MISS. CODE ANN. § 93-13-137 (1972)), previously stated the duties and powers of guardians of persons of unsound mind, convicts, alcoholics, and drug addicts. This section was amended by Act of April 27, 1972, ch. 408, §§ 15, 16, 1972 Miss. Laws ch. 467, *codified at* MISS. CODE ANN. § 93-13-137 (1972), to be applicable to all wards, and was renumbered as MISS. CODE ANN. § 93-13-38 (Supp. 1980).

Additionally, § 91-9-209 provides that the guardian of the estate of a beneficiary ward under a legal disability may act for the beneficiary in making any appointment, approving any accounting, and giving any direction permitted under §§ 94-9-201 to -213 (general trust provisions concerning the resignation and succession of trustees). Furthermore, since most state statutes, including Mississippi's, define the powers and duties of the guardian in general terms, the common law continues to be controlling in many instances. 39 AM. JUR. *Guardian and Ward* § 61 (1968).

[89] MISS. CODE ANN. § 93-13-38 (Supp. 1980). In addition, § 93-13-41 provides that a guardian shall not commit waste on the real estate of his ward. As long as the guardian acts with reasonable diligence, he cannot be held liable for any loss or depreciation of the ward's funds. *In re* Adams' Guardianship, 169 Miss. 20, 24, 152 So. 836, 837 (1934) (guardian's failure to act upon warning that bank was in failing condition and that the depositor's guaranty law was suspended resulted in making guardian liable for ward's funds lost upon bank failure). Even though a guardian's appointment has been rendered a nullity following revocation of his letters of guardianship, a guardian can be held liable for losses resulting from his mismanagement of the ward's estate. Earle v. Crum, 42 Miss. 165, 167 (1868) (objection to court order requiring improperly appointed guardian to file a final accounting); *see* note 76 *supra*.

[90] MISS. CODE ANN. § 93-13-38 (Supp. 1980). Section § 93-13-27 further provides that all suits on behalf of a ward for whom a guardian has been appointed shall be brought in the name of the guardian and such suits may be commenced only after authority has been granted by court decree.

[91] Provisions of the law relating to the probate and registration of claims by administrators and executors also apply to guardians. *Id.* § 93-13-38. Section § 91-7-155 makes it the duty of an administrator or executor to pay a solvent estate's probated claim.

[92] *Id.* § 93-13-38.

thorized to decree the sale or lease[93] of all or part of the real[94] or personal property of a ward under terms the chancellor may impose[95] if he finds it to be in the ward's best interest.[96] The court can require that the guardian post additional bond when a sale of the ward's real property is ordered,[97] and the sale is void if the additional bond is not posted.[98] A decree issued pursuant to a guardian's request for the sale of land owned by his ward is

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[93] The guardian may present a petition to the court for the proposed sale of the ward's land. If, at the hearing, the court is satisfied that the proposed sale will be beneficial to the ward, it may decree a sale and prescribe its conditions. *Id.* § 93-13-51. The court can order the sale or lease of the ward's property only for purposes specified or intended by statute, and it is the duty of the chancery court to see that the price is fair and reasonable. Thompson Funeral Home v. Thompson, 249 Miss. 472, 478, 162 So. 2d 874, 876 (1964) (chancery court had no authority to authorize sale by guardian of ward's estate where purchase price had to be determined by *privately* appointed appraisers).

[94] The sale of the ward's land must be reported to the court at the first term after the sale is made. Hoel v. Coursery, 26 Miss. 511, 520 (1853) (suit to enjoin ejectment).

[95] MISS. CODE ANN. § 11-5-117 (1972); *id.* § 93-13-51 (Supp. 1980).

[96] The guardian must petition the court for authority to sell the ward's real property, and summons is issued pursuant to § 93-13-281. *See* note 50 *supra*. If those persons enumerated in MISS. CODE ANN. § 93-13-281 (Supp. 1980) join in the petition, only an *ex parte* proceeding is necessary. *Id.* § 93-13-51. Generally, two adult next of kin must be made defendants, so that persons who should be concerned with the ward's welfare can be informed of the plans for the ward's property and be in a position to object to the sale should they so desire. Schrader v. Texas Co., 211 Miss. 214, 232, 51 So. 2d 460, 466 (1951) (sale of ward's mineral interests by guardian upheld despite failure to serve summons on adult next of kin, since the adults appeared and filed answers to guardian's petitions); *cf.* Temple v. Hammocke, 52 Miss. 360, 366 (1876) (requiring three next of kin as defendants). *But see* Fitzpatrick v. Beal, 62 Miss. 244, 249 (1884) (requiring no notice to next of kin when, due to insufficiency of personal estate, sale is necessary for ward's maintenance and education). The court may also order that any real or personal property of the ward be sold and the money reinvested in a prescribed manner if to do so would be advantageous to the ward. MISS. CODE. ANN. § 93-13-45 (1972).

Additionally, § 93-13-281 provides that if there are no adult relations within the third degree as calculated by the civil law method, the court may designate a guardian *ad litem* to answer the petition on behalf of the ward.

The court may allow the sale of a ward's property that is owned jointly with an adult who is selling his interest, if the buyer would also like to buy the ward's interest. The ward's interest, however, must have a fair market value of less than $2,000. Further, the price that the ward receives must be no less than the same proportionate price received by the adult co-owner, and no part of the cost of the proceedings may be charged to the ward. *Id.* § 93-13-217. Section § 93-13-53 gives the court authority to order the sale of the ward's personal property.

[97] MISS. CODE ANN. § 93-13-51 (Supp. 1980).

[98] Vanderburg v. Williamson, 52 Miss. 233, 235 (1876) (suit to recover land improperly sold by guardian).

also void unless the ward is present at the proceeding or a guardian *ad litem* is appointed.[99] However, acceptance by an adult ward of the purchase price of land sold under a void decree acts as a confirmation of the sale and he is estopped from claiming legal title.[100] If the guardian purchases the ward's property at a sale, the purchase is voidable at the election of the ward, even if the sale is rightful.[101]

A guardian may cultivate or lease his ward's real property[102] and may also lease the oil, gas, and mineral rights to the ward's property when to do so is in the ward's best interest.[103] The guardian can also use funds of the ward to improve the ward's land, if the court authorizes the expenditure.[104] Further, if in the ward's best interest, the court can approve extensions or renewals of encumbrances on the ward's property, and may allow further encumbrances in order to make necessary repairs to the property.[105]

A guardian must ask for the court's direction in investing the ward's money which is not needed for current expenditures

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[99] Rule v. Broach, 58 Miss. 552, 555 (1880) (action for ejectment from lands sold pursuant to decree authorizing guardian to sell land for taxes).

[100] Handy v. Noonan, 51 Miss. 166, 169-70 (1885) (purchasers at void sale of ward's land sued to remove ward's claim as a cloud on their title); Parmele v. McGinty, 52 Miss. 475, 484 (1875) (suit to cancel guardian's sale of ward's land under void decree).

[101] Brockett v. Richardson, 61 Miss. 766, 781 (1884) (suit attacking validity of purchase of ward's land by guardian); *see* Scott v. Freeland, 15 Miss. (7 S. & M.) 409, 418 (1846) (wards' suit to set aside purchase of their land by their guardian). Unreasonable delay in objecting to the sale by the ward is considered an implied ratification. *Id.* at 419. The sale of the ward's land can always be set aside if the sale was fraudulent, and an element of such fraud is gross inadequacy of consideration. Corley v. Myers, 198 Miss. 380, 394, 22 So. 2d 234, 236 (1945) (appeal from decree setting aside mineral lease executed by guardian).

[102] The property can be leased for not more than three years, and the lease cannot extend beyond the date upon which the ward reaches majority. With court approval, the land can be leased for up to six years if it is advantageous to the ward but, again, the lease cannot extend beyond the date that the ward reaches majority. MISS. CODE ANN. § 93-13-41 (Supp. 1980).

[103] The guardian must petition the court for authority to lease the oil, gas and mineral rights, and summons is issued pursuant to § 93-13-281. *See* note 50 *supra*. If the next of kin join in the petition, no notice is required and an *ex parte* hearing is held. MISS. CODE ANN. § 93-13-43 (Supp. 1980).

[104] MISS. CODE ANN. § 93-13-45 (1972).

[105] *Id.* § 93-13-47.

or which he has not been directed to invest.[106] Also, although the guardian is not liable for loans made at the court's direction, he must use sound judgment if investment is left to his discretion.[107] This request for direction is also applicable to the disposition of securities or other investments that the ward receives by inheritance, gift, or bequest, and which the guardian is not authorized to invest.[108] In no instance, however, may the ward's funds be invested in a manner which is not specifically allowed by statute.[109]

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[106] Brewer v. Herron, 171 Miss. 435, 439, 157 So. 522, 523 (1934) (suit to recover unauthorized loan of ward's funds). Without prior court approval, the guardian has no authority to invest the ward's funds, and is liable for any unsecured loss. *Id.*, 157 So. at 523. *But cf. In re* Adams' Guardianship, 169 Miss. 20, 25, 152 So. 836, 837 (1934) (guardian not liable for loss of funds temporarily deposited while awaiting court approval of permanent disposition).

[107] MISS. CODE ANN. § 93-13-57 (1972). A prudent guardian, acting under court authority, is not liable for losses attributable to normal business risks. Dorsey v. Murphy, 188 Miss. 291, 309, 194 So. 603, 607 (1940) (suit against guardian for ward's losses due to bank failure). A guardian may be held liable, however, when he has reason to believe that the loss will occur, yet does nothing. *In re* Adams' Guardianship, 169 Miss. 20, 24, 152 So. 836, 837 (1934).

[108] MISS. CODE ANN. § 93-13-55 (1972). The court will decide whether the guardian should retain the securities or investments or sell them and reinvest the proceeds. If the court directs retention of the security, the guardian is not liable for the future sufficiency of the investment. *Id.*

[109] Davis v. Harris, 21 Miss. (13 S. & M.) 9, 10-11 (1849) (judgment holding void a conveyance to ward in consideration for funds used by guardian). The court may direct that the ward's funds be invested in state, county, municipal, United States or levee board bonds, in shares of savings and loan associations, and in certain trust notes or in common notes. MISS. CODE ANN. § 93-13-57 (1972). The guardian can make no profit from use of the ward's funds. Wood v. Stafford, 50 Miss. 370, 373 (1874) (suit to recover land bought by guardian's spouse with ward's funds).

If the court approves, a guardian may use the ward's funds or borrowed funds to purchase land for a home for the ward or his family. MISS. CODE ANN. § 93-13-38 (Supp. 1980). If in the ward's best interest, the court may grant the guardian's petition to buy land for the ward with surplus funds. The court may also authorize the completion of payment for land inherited by the ward or decree that the ward's unpaid portion be sold. If payment is approved, the sale of real or personal property may be authorized if necessary to make the payment. *Id.* § 93-13-49 (1972). Under no circumstances may a guardian use the ward's estate to buy real property without court approval. Gully v. Dunlap, 24 Miss. 410, 411 (1852) (suit by guardian's creditors to satisfy claim with property bought with ward's funds).

Historically, the chancery court has had no power to authorize an investment; therefore, a guardian could not invest the ward's funds in speculative corporate stocks, Carlisle v. Love, 170 Miss. 621, 637, 155 So. 197, 202 (1934) (suit to collect par value of stock from guardian), in a partnership, Shemper v. Hancock Bank, 206 Miss. 775, 778, 40 So.

A guardian cannot reap any benefit from the use of the ward's money,[110] and he is forbidden by statute to loan the money to certain individuals.[111] Failure to comply with the provisions governing investment of the ward's funds[112] renders the guardian liable for the amount of the funds plus interest.[113] Although only simple interest may be charged in cases of negligence, compound interest can be charged in cases of fraud or intentional misconduct.[114]

A guardian has a duty to use the income or corpus of the ward's estate as is necessary for the comfortable maintenance and support of the ward and his family[115] but, before this can be done, the guardian must obtain a court order fixing the amount.[116] While the chancery court may give retrospective ap-

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2d 742, 744 (1949) (suit to collect note on partnership in which ward's funds were invested), or bind the ward's funds as surety for another, McGavock v. Whitfield, 45 Miss. 452, 460 (1871) (suit for collection of promissory note with ward's estate as collateral). Also, a guardian could not invest the ward's funds in insurance policies. *In re* Guardianship of Horne, 178 Miss. 714, 724, 173 So. 660, 661 (1937) (suit to recover funds invested in insurance with court's approval). *Contra*, notes 123 through 125 and accompanying text *infra*. The above limitations on investments seem to have been negated, however, by MISS. CODE ANN. § 91-13-1, -3 (1972). A guardian can acquire and retain any real, personal or mixed property and every kind of investment as long as he acts prudently, *id.* § 91-13-3, unless prohibited from, or directed to, a particular form of investment by deed, will or trust instrument or other person creating the guardianship, *id.* § 91-13-1.

[110] Gully v. Dunlap, 24 Miss. 410, 411 (1852).

[111] The guardian cannot borrow, or use for his own benefit, the funds or property of the ward. Neither can the guardian loan the estate's property or funds to any parent, brother, sister, son or daughter of the ward, or to himself, or to any attorney or agent representing him or the ward. These loans cannot be approved by the court. MISS. CODE ANN. § 91-7-253 (Supp. 1980).

[112] *See* notes 106 through 111 and accompanying text *supra*.

[113] Dorsey v. Murphy, 188 Miss. 291, 310, 194 So. 603, 607 (1940) (suit to recover funds improperly invested by guardian). The guardian may be charged eight percent interest on money that is not needed or allowed for expenditures, if these funds are not reported to the court for an order of disposition. MISS. CODE ANN. § 93-13-57 (1972).

[114] Jones v. Parker, 216 Miss. 64, 71-72, 61 So. 2d 681, 683 (1952) (contesting guardian's final account). Conversion of the ward's funds by the guardian amounts to a simple debt, for which simple interest is authorized. *Id.* at 71, 61 So. 2d at 683. *But see* Crump v. Gerock, 40 Miss. 765, 773 (1866) (guardian liable for compound interest where he makes a large profit from ward's funds).

[115] MISS. CODE ANN. § 93-13-38 (Supp. 1980). The ward's family includes the "husband or wife and children; if there be no husband, wife, or children, the father and mother; and if there be no father or mother, then the grandfather and grandmother, sisters and brothers of said ward." *Id.*

[116] *Id.* A guardian may not spend more than the income of the ward's estate for the

proval to expenditures made from income without a prior order,[117] it is powerless, except in extreme circumstances,[118] to approve unauthorized expenditures from corpus.[119] If one or both of the ward's parents are alive, however, the court will determine if the parent or parents, rather than the ward's estate, should bear the expense of maintaining and educating the ward.[120]

The chancery court can empower a guardian to sell or compromise his ward's claims if to do so is in the ward's best interest.[121] Before a compromise can be effective, however, there

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ward's support and education, unless the court gives prior authorization. The court may authorize the sale of the ward's personal and real property to raise the difference between the income of the estate and the amount authorized to be spent. If in the ward's best interest, the court may order the real property sold before the personal property. *Id.* § 93-13-35 (1972).

[117] Brown v. Mullins, 24 Miss. 204, 205 (1852) (suit by ward to compel guardian to file a final account). *But see* Welch v. Childers, 195 Miss. 415, 420, 15 So. 2d 690, 691 (1943) (requiring prior court authorization of all expenditures by guardian for ward's maintenance and education). The amount of income to be spent for the ward's maintenance and education is left to the guardian's discretion as long as he acts reasonably. A guardian should, therefore, ask prior court approval of all expenditures in order to protect himself from a future disallowance of the expenditures as having been unreasonable. Neville v. Guardianship of Kelso, 247 So. 2d 828, 834-35 (Miss. 1971) (suit by successor guardians contesting expenditures by prior guardian).

[118] The court can approve an unauthorized expenditure from corpus where life and death are involved and there is no time for prior court approval. Williams v. Bonner, 79 Miss. 664, 668, 31 So. 207, 208 (1902) (suit by doctor to recover amount due for emergency treatment of ward). *But see* Deposit Guar. Bank & Trust Co. v. Mangum, 172 Miss. 443, 449-50, 160 So. 386, 387 (1935) (holding that expenses must be necessary and an emergency must exist, otherwise these expenses are unauthorized). The *Williams* court held that an unauthorized expenditure from corpus can also be ratified if the court would have approved the expenditure had it foreseen the event which created the expense. 79 Miss. at 668, 31 So. at 208.

[119] *See, e.g.*, Neville v. Guardianship of Kelso, 247 So. 2d 828, 832 (Miss. 1971) (chancery court without power to approve and ratify expenditures for corpus by a guardian without prior order); Boyd v. Hawkins, 60 Miss. 277, 281 (1882) (court has no authority to approve any unauthorized expenditures from corpus).

[120] MISS. CODE ANN. § 93-13-37 (1972). The purpose of this statute is to require parents who are able to support their minor children to do so without regard to any estate the child may have. Neville v. Guardianship of Kelso, 247 So. 2d 828, 832 (Miss. 1971). A guardian must therefore obtain a prior court order authorizing expenditures for the maintenance of a ward who has living parents. Darter v. Speirs, 61 Miss. 148, 149-50 (1883) (guardian's unauthorized expenditures for wards whose mother was destitute).

[121] MISS. CODE ANN. § 93-13-59 (1972). The guardian is authorized to accept real or personal property in satisfaction of the claim if in the ward's best interest. The law that applies to the compromise of claims by executors and administrators also applies to guardians. *Id.* The court can authorize an executor or administrator to sell or compro-

must be a hearing at which the interests of the ward are properly represented.[122] A guardian also may be authorized by the court to use the ward's funds to pay premiums for insurance policies issued during the lifetime of the ward's parents if continuance of the policies is warranted.[123] The guardian of a minor under fifteen years of age[124] may contract for life insurance either for the ward's benefit on the life of any person from whom the ward is to receive an inheritance, or on the ward's life for the benefit of anyone who has an insurable interest in his life.[125]

There is a presumption of undue influence in any transaction between a ward and his guardian. Such a transaction is prima facie void,[126] but can be ratified by the ward when he reaches majority if he has full knowledge of all relevant facts and is free from the guardian's influence.[127]

During the ward's lifetime, the guardian may elect to renounce a will that names the ward as a beneficiary, if court approval is first obtained.[128] In Mississippi, there is no authority that supports the right of a guardian to make gifts from his

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mise any claim that cannot be readily collected, but the order of authorization cannot be made until six months after the granting of letters. *Id.* § 91-7-229.

[122] Union Chevrolet Co. v. Arrington, 162 Miss. 816, 827, 138 So. 593, 595 (1932) (suit contesting validity of compromise of wrongful death claim made without court approval).

[123] Miss. Code Ann. § 93-13-39 (1972). During the lifetime of the ward, the guardian may be authorized to change the beneficiary of insurance policies on the life of the ward. No such action can be authorized, however, after the ward dies. South v. United States, 262 F. Supp. 321, 324 (N.D. Miss. 1966) (guardian sought to change beneficiary of deceased ward's life insurance).

[124] Minors 15 years of age or older can contract for insurance without a guardian's approval. Miss. Code Ann. § 83-7-19 (1972).

[125] *Id.*

[126] Meek v. Thornton, 36 Miss. 190, 252 (1858) (will made by ward naming guardian as principle beneficiary).

[127] Brandau v. Greer, 95 Miss. 100, 103-04, 48 So. 519, 520 (1909) (suit to compel cancellation of foreclosure sale of ward's property). The ward must also have full knowledge of all relevant law. *Id.*, 48 So. at 520.

[128] Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 756, 125 So. 2d 93, 95 (1960) (administrator of husband's estate sought to renounce will of husband's deceased spouse). The court may authorize the renunciation of a will after the statutory period for renunciation ends if the ward for whom renunciation is sought had no guardian during the statutory period. Wolcott v. Wolcott, 184 So. 2d 381, 383-84 (Miss. 1966) (suit by guardian of incompetent widow to renounce deceased husband's will after expiration of statutory period).

ward's estate for estate planning purposes. However, other states have allowed such gifts to be made by statute,[129] by implication,[130] or under the doctrine of substituted judgment.[131]

C. Ward's Rights and Liabilities

A ward is incapable of making an express contract,[132] but a contract will be implied by law for his necessities, and the court will authorize payment from his estate.[133] In addition, the estate of a ward who undergoes court-approved emergency medical

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[129] *See* MASS. GEN. LAWS ANN. ch. 201, § 38 (West Supp. 1981) (guardian may apply proceeds from sale of ward's estate toward making of gifts, among other things, in ward's behalf).

[130] *See, e.g., In re* Trott, 118 N.J. Super. 436, 288 A.2d 303, 305 (Super. Ct. App. Div. 1972) (chancery court, acting in role of protector of all incompetents, can authorize gifts for estate planning purposes); *In re* Morris, 111 N.H. 287, 281 A.2d 156, 158 (1971) (statute requiring guardian to improve ward's estate without waste implies right to make gifts for estate planning purposes).

[131] *See, e.g., In re* Guardianship of Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505, 511-14 (1967) (guardian seeking authority to make gifts of part of incompetent's property to reduce estate taxes); *In re* du Pont, 41 Del. Ch. 300, 194 A.2d 309, 316-17 (1963) (petition by guardians of incompetent to make substantial gifts to save estate taxes); In re Guardianship of Bohac, 380 So. 2d 550, 553 (Fla. Dist. Ct. App. 1980) (petition to make gifts to beneficiaries of incompetent's will to save estate taxes); *In re* Turner, 61 Misc. 2d 153, 305 N.Y.S. 2d 387, 389 (Sup. Ct. 1969) (denying authority to make gifts for estate planning purposes as gifts contradicted incompetent's intention). *But see In re* Guardianship of Estate of Neal, 406 S.W.2d 496, 502 (Tex. Civ. App. 1966) (finding no legislative authority for use of substituted judgment doctrine). Under the doctrine of substituted judgment, the primary consideration is what would probably have been done by the incompetent if he were under no disability. *See, e.g., In re* du Pont, 41 Del. Ch. 300, 194 A.2d 309, 317 (1963) (incompetent ward would probably not have made gifts of stock to family members); *In re* Guardianship of Bohac, 380 So. 2d 550, 553 (Fla. Dist. Ct. App. 1980) (refusing to approve gifts to only son whom ward had previously disinherited).

[132] Hines v. Potts, 56 Miss. 346, 350-51 (1879) (suit to recover funds paid by petitioner to discharge ward's debts). There is a rebuttable presumption that a person under a legal disability is incapable of making a contract, Deposit Guar. Bank & Trust Co. v. United States, 48 F. Supp. 369, 370-71 (S.D. Miss. 1943) (suit to recover disability payments under War Risk Insurance Act), and a rebuttable presumption that a person under no legal disability is capable of contracting. Hamilton Bros. Co. v. Narciese, 172 Miss. 24, 35, 158 So. 467, 470 (1935) (attacking validity of release allegedly made while injured party was incompetent).

[133] The court will authorize payment from the ward's estate for necessities, Bryant v. Stringer, 183 So. 2d 895, 898 (Miss. 1966) (daughter claimed compensation for services rendered to father prior to his death), which include wants of the ward "that are personal to body and mind . . . ." McCully v. McCully, 175 Miss. 876, 882, 168 So. 608, 609 (1936) (disallowing claim for expenses in caring for deceased incompetent).

treatment can be held liable for the expense involved.[134] Also, during lucid intervals, an incompetent ward can execute a valid will.[135]

Under certain circumstances, payments for oil, gas and mineral leases may be made directly to a ward.[136] In addition, payment of ordinary debts that do not exceed $2000 may be made directly to the ward or to someone for the ward if the court first determines that the settlement is in the ward's best interest.[137]

All suits for or on behalf of a ward must be brought in the name of the ward's guardian, and court approval of the suit must be obtained before commencement.[138] Further, such suits must be filed by the guardian in accordance with the statute of limitations, for if the statute runs against a guardian who has legal title to a cause of action, the statute also runs against the ward, even though he is under a legal disability.[139] A ward cannot, however, sue[140] or be sued by his guardian while the guard-

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[134] MISS. CODE ANN. § 41-41-9 (1972). Emergency medical treatment can be authorized if a physician files a written statement advising that there is an immediate need for surgical or medical treatment. The judge or clerk of any court may consent to or order the procedure if the only person who can consent on behalf of the incompetent refuses to do so, and some instrument invoking the aid of the court has been filed. The reasonable expense of the treatment is paid either by the incompetent or by one lawfully charged with payment of his necessities. If they are unable to pay, the county of residence of the person receiving the treatment does so. *Id.*

[135] *See* note 188 and accompanying text *infra.*

[136] Payment of a delay rental under an oil or gas or an oil, gas, and mineral lease which does not exceed $50 can be paid directly to a ward who is over 12 years old and has no duly appointed guardian of his estate. Payment by this method relieves the debtor of liability. MISS. CODE ANN. § 93-13-213 (Supp. 1980).

A maximum of $250 as accrued or impounded runs of production or royalties under an oil, gas, and mineral lease may be paid directly to a ward who has no duly appointed guardian. *Id.* § 93-13-215. Payments may also be made on a monthly basis or other basis not to exceed the equivalent of $25 per month. *Id.*

[137] *Id.* § 93-13-21. This payment relieves the debtor of any further liability. *Id.*

[138] *Id.* § 93-13-27. A certified copy of the order authorizing the suit must be attached to the instrument commencing the suit. *Id.*

[139] *Id.* § 15-1-53 (1972).

[140] Davis v. Davis, 135 Miss. 214, 223-24, 99 So. 673, 673 (1924) (suit to attach ward's land to satisfy debt owed guardian); United States Fidelity & Guar. Co. v. Jackson, 111 Miss. 752, 755, 72 So. 150, 151 (1916) (suit by ward to recover funds deposited by guardian in bank that failed).

A minor ward must bring suit against his guardian and the sureties on the guardian's bond within five years of the ward's attaining 21 years of age. MISS. CODE ANN. § 15-1-27 (1972).

ian is in office.[141]

In suits against a ward, process must be served on both the ward and his guardian,[142] but the guardian may waive service of process in civil actions.[143] A judgment rendered against a ward who is not properly represented is voidable.[144] Further, a suit against a guardian on a cause of action against the ward must be brought within four years after the guardian qualifies.[145]

D. Annual Accounts and Inventory

A guardian must give the court an inventory of all the ward's real and personal property within three months of his appointment.[146] Inventories of property subsequently received and of any increase in the estate must also be submitted to the court.[147] Failure to submit an inventory is a ground for removal

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[141] Davis v. Davis, 135 Miss. 214, 223-24, 99 So. 673, 673 (1924).

[142] MISS. CODE ANN. § 13-3-45 (1972). If both the ward and the guardian are not served before the statute of limitations runs, the suit is barred. Potts v. Hines, 57 Miss. 735, 737 (1880) (complaint not amended to make both guardian and ward defendants until after statute of limitations had run).

If the defendant is an inmate of a mental institution, service of process on the defendant is not necessary if the institution's director or superintendent certifies that the defendant is mentally incapable of responding to process. MISS. CODE ANN. § 13-3-45 (1972).

[143] MISS. CODE ANN. § 13-3-71 (1972). The waiver must be written and executed after the suit is filed. *Id.*

[144] Sherwood v. Pearl River Valley Water Supply Dist., 301 F. Supp. 61, 63 (S.D. Miss. 1969) (action by deceased's administrator challenging taking of deceased's property), *aff'd per curiam*, 427 F.2d 717 (5th Cir.), *cert. denied*, 400 U.S. 832 (1970); Scott v. United States, 190 F.2d 134, 137 (5th Cir. 1951) (suit claiming service of process did not meet statutory requirement). Citing *Scott*, the *Sherwood* court found that a judgment rendered against a ward who was not properly represented is good until set aside by direct attack. Even then, the judgment will not be set aside unless, in addition to lack of representation, a meritorious defense is prima facie shown. 301 F. Supp. at 63. *Cf.* Sledge v. Boone, 57 Miss. 222, 225 (1879) (infant may attack an improper decree by an original bill). *Contra* Bailey v. Fitz-Gerald, 56 Miss. 578, 584 (1879) (holding as void a decree issued where ward not properly represented).

[145] MISS. CODE ANN. § 15-1-25 (1972). It is important that the suit be brought while all the evidence can be found. First Nat'l Bank & Trust Co. v. Landau, 183 Miss. 651, 657, 184 So. 618, 619 (1938) (appeal from decree holding that claim against incompetent's estate was not barred by statute of limitations).

[146] MISS. CODE ANN. § 97-13-33 (1972). The inventory must include any debt owed to the ward by the guardian which arose prior to his being appointed. Neill v. Neill, 31 Miss. 36, 41 (1856) (suit to compel guardian to include debt owed to ward in inventory).

[147] MISS. CODE ANN. § 97-13-33 (1972). A guardian exceeds his duty by collecting the

of the guardian and suit on his bond.[148]

At least once each year a guardian must file an account[149] of the ward's estate showing receipts of money,[150] products of the estate, sales or other dispositions, and each item of expense for the ward's maintenance and education and for the preservation and management of the estate.[151] The chancery court can require more than one accounting yearly or, in certain situations, dispense with all but the final account.[152] A guardian may be removed for failure to submit a required account[153] or may be held personally liable for accounts that do not clearly identify the ward's assets and liabilities.[154] Although a guardian's accounts are prima facie correct,[155] they can be reopened by the

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money of the ward in another state. If such money is collected, however, it must be included in the inventory of the ward's estate and the guardian is liable for it. Martin v. Stevens, 30 Miss. 159, 160-61 (1855) (suit for accounting and return of money collected by guardian in South Carolina). Neither is the guardian entitled to compensation for services rendered in collecting money or property out of state. Maxwell v. Harkleroad, 77 Miss. 456, 462, 27 So. 990, 992 (1900) (suit by ward contesting guardian's compensation).

[148] MISS. CODE ANN. § 93-13-33 (1972).

[149] The accounts of each of a guardian's several wards must be kept separately, but may be combined in court orders and decrees concerning the accounts if to do so is practical. *Id.* § 93-13-69.

The annual accounts are required so the court may protect the financial interest of the ward. Reynolds v. Walker, 29 Miss. 250, 268 (1855) (suit contesting guardian's final account).

[150] The guardian appears as the ward's debtor in the annual account, to the extent of the funds received for the ward by the guardian. Roach v. Jelks, 40 Miss. 754, 756 (1866) (appeal from decree ordering money received by the guardian to be excluded from final account); Reynolds v. Walker, 29 Miss. 250, 266 (1855) (suit contesting guardian's final account).

[151] MISS. CODE ANN. § 93-13-67 (Supp. 1980).

[152] *Id.* If the funds and personal property of the ward do not exceed $3000, and there is no prospect of further receipt other than interest, or if funds on hand or to be received are from the welfare department, the court may dispense with all but the final account. *Id.*

[153] United States Fidelity & Guar. Co. v. Jackson, 111 Miss. 752, 755, 72 So. 150, 151 (1916) (suit to recover funds deposited by guardian in bank that failed); Reynolds v. Walker, 29 Miss. 250, 265 (1855) (suit contesting guardian's final account).

[154] Adams v. Westbrook, 41 Miss. 385, 403-04 (1867) (suit by ward claiming guardian misused ward's funds). In a proper case, errors in the guardian's accounts due to negligence may be corrected. McFarlane v. Randle, 41 Miss. 411, 428 (1867) (taking exception to guardian's accounting for ward's money in Confederate currency).

[155] Heard v. Daniel, 26 Miss. 451, 453 (1853) (suit to compel guardian to make final account).

ward and proved to be incorrect.[156]

Each expense stated in a guardian's account must be accompanied by a voucher[157] in order for it to have probative value.[158] A voucher will not be allowed unless it conforms to, or can be made to conform to, the statutory voucher requirements for executors and administrators.[159]

A guardian is entitled to a credit in his annual and final[160] accounts for attorney's fees paid or allowed in the management of or on behalf of the estate if the court deems the services proper and rendered in good faith.[161] If the guardian also acts as the ward's attorney, the court may allow him reasonable compensation in his capacity as attorney, in lieu of his compensation as guardian.[162]

IV. Terminating Guardianships

A. Nonresidents and Removal of Ward or Property

The chancery court of the county of an adult incompetent's residence has the authority to appoint a guardian for the incom-

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[156] Johnson v. Miller, 33 Miss. 553, 558 (1857) (objection to guardian's being allowed to correct accounts). The guardian has no right to reopen and falsify an account. *Id.*

[157] Miss. Code Ann. § 93-13-67 (Supp. 1980).

[158] White v. Moore, 164 Miss. 272, 279, 144 So. 696, 698 (1932) (suit to compel guardian to file final account).

[159] Miss. Code Ann. § 93-13-71 (1972). Every voucher must be written on or connected to at least one-half of a sheet of legal size paper or may be an ordinary bank check. Each voucher must give the name and number of the appropriate case and must be filed with the clerk. *Id.* § 91-7-279.

If the court requires a voucher to be produced even though one is not required by law, the guardian need only produce papers which substantiate each expenditure. The court may, in its discretion, require the records or copies of the records to be filed. *Id.* § 93-13-73.

[160] For an explanation of the guardian's final account, see notes 175 through 179 and accompanying text *infra*.

[161] *See* Miss. Code Ann. § 91-7-281 (1972). This section, pertaining to attorney's fees for the estates of deceased persons, is made applicable to guardians by § 93-13-79.

Attorney's fees incurred in the management of a guardianship are personal obligations of the guardian and not obligations of the estate of the ward. A guardian may be allowed attorney's fees in managing the estate by petitioning the court, but the attorney cannot directly petition the court for fees due. Hutton v. Gwin, 188 Miss. 763, 770, 195 So. 486, 488 (1940) (suit by attorney for recovery for services rendered in connection with guardianship).

[162] Miss. Code Ann. § 91-7-281 (1972).

petent even though a guardian has been properly appointed in another state.[163] The guardian of a nonresident ward who is appointed in the ward's state of residence is entitled to be substituted for a guardian appointed in Mississippi.[164] Further, a nonresident guardian who is appointed in the ward's state of residence may sue in Mississippi courts on behalf of the ward.[165]

Under certain conditions, a guardian can be allowed to take the ward and the ward's personal property to another county[166] or state.[167] If it appears that the guardian, without authority, is

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[163] *Id.* § 93-13-121 (Supp. 1980). The petition for appointment is filed by the incompetent or his guardian in the chancery clerk's office in the incompetent's county of residence. Process is served under § 93-13-281. *See* note 50 *supra.*

The court, or chancellor in vacation, examines the incompetent in person on return day and determines if the incompetent is able to manage his property. If not, the court will appoint a guardian for his estate. The guardian must file annual accounts as must other guardians. *Id.* § 93-13-121.

[164] *See, e.g.,* Washington Bank & Trust Co. v. Magee, 187 Miss. 198, 203, 192 So. 438, 438-39 (1939) (suit by Louisiana tutor to be substituted for Mississippi guardian of Louisiana ward); Moore v. Jones, 99 So. 437, 437 (Miss. 1924) (action between in-state and nonresident guardians to determine guardianship of ward). A nonresident guardian of a nonresident ward who has real or personal property in Mississippi is entitled to be appointed guardian in Mississippi by the chancery court of the county in which the property is owned. The nonresident guardian must present the original letters of guardianship or a certified copy to the court, and must post bond as do other guardians. MISS. CODE ANN. § 93-13-181 (Supp. 1980). "Guardian" as used in this section of the Mississippi Code, and §§ 93-13-183, -185, includes all persons in other states or countries who "stand in the relation of guardian to such ward." *Id.* § 93-13-187.

[165] MISS. CODE ANN. § 93-13-183 (1972). When a minor's state or country of residence vests administration of his estate in his parents while living, the parents may sue in Mississippi on the minor's behalf. The parents must first file a certificate from the judge or clerk of the court of the minor's residence stating that the minor and parent live within that court's jurisdiction. The certificate must be filed in the chancery clerk's office in the county in which the claim exists. *Id.* § 93-13-29. A Mississippi court has no authority to decree the sale of the ward's land that is located in another state. *See* Musson v. Fall Back Planting & Mercantile Co., 12 So. 587, 588 (Miss. 1891) (suit attacking validity of sale of Mississippi ward's land in Louisiana).

[166] MISS. CODE ANN. § 93-13-61 (1972). The guardian can be appointed by the chancery court in the new county and released from his bond in the original county upon final settlement. *Id.*

[167] *Id.* § 93-13-63. The guardian must give bond with two Mississippi sureties in the full value of the ward's personal estate. The bond is conditioned on the guardian's qualifying as guardian in the state or country to which he is removing the property and ward. The guardian must also make final settlement of his guardianship accounts. *Id.* Because the purpose of requiring a court order for the removal of the ward and his property is "the civil protection of the person and property of the ward, and not for the purpose of making such removal an offense against the state," Hemphill v. State, 127 Miss. 805, 812,

about to take the ward's property from the state, the sheriff can be ordered to seize the property.[168] Finally, the court can allow a nonresident guardian to remove a nonresident ward's personal property from the state.[169]

B. *Guardian's Discharge and Termination of Guardianship*

A guardian may be removed by the court for sufficient cause[170] or he may resign.[171] Guardians may also be removed if the ward is restored to reason[172] or if the value of the estate of a minor or incompetent falls below $2000 and there is no prospect of further receipts.[173] Any guardianship, including the natural guardianship, terminates when the minor reaches the age of

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90 So. 488, 489 (1922) (appeal from guardian's kidnapping conviction), a guardian who takes his ward to another place of residence against the ward's will is not guilty of kidnapping.

[168] MISS. CODE ANN. § 93-13-65 (1972).

[169] *Id.* § 93-13-185. The court may, in its discretion, allow such removal after the guardian makes final settlement of the estate, and after the court approves bond in the amount of the full value of the property to be removed. The guardian must present to the court that appointed him a complete inventory of the ward's property that is being removed. Failure to do so renders the guardian liable on his bond. *Id.*

[170] *Id.* § 93-13-23. It is left to the court's discretion to determine what constitutes sufficient cause for removal. Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (mother of ward petitioned to have guardian removed and herself appointed). A breach of a material condition of the letters of guardianship, Hosey v. Myers, 240 So. 2d 252, 252 (Miss 1970), and the conviction of the guardian of a felony, Hemphill v. Smith, 128 Miss. 586, 593, 91 So. 337, 338 (1922), have been held to be sufficient cause for the guardian's removal.

[171] MISS. CODE ANN. § 93-13-25 (1972). When the guardian dies, resigns, or is removed, the court may appoint another. *Id.* A guardian should resign when he has an interest adverse to his ward that affects his ability to be loyal. Liddel v. Strong, 183 Miss. 805, 814, 184 So. 432, 433 (1938) (ward's funds lost when bank at which guardian was cashier became insolvent).

[172] MISS. CODE ANN. § 93-13-133 (1972). If the ward has been restored to reason, the court may terminate the guardianship, allow the guardian reasonable compensation, and turn over the estate's property to the ward. This also applies if it appears that an adjudged drunkard or drug addict has been sufficiently reformed. *Id.* The chancery court of the county in which the guardian was appointed, or the chancellor in vacation, may hold a hearing to determine if the incompetent has been restored to reason. *Id.* § 93-13-151 (Supp. 1980).

[173] *Id.* § 93-13-75 (Supp. 1980). After final settlement, the court must have the power to have the property delivered to the ward or to some person or bank under specified conditions imposed by the court. The person receiving the property becomes liable to the court for the proper use of the money for the ward's benefit, but no security is required. *Id.*

twenty-one.[174] The court may, at its discretion, terminate the guardianship of any married minor who is over eighteen years of age.[175]

When a guardianship ends, the guardian must make a final settlement,[176] which consists of a statement of all balances of his annual accounts[177] and all other charges and amounts received.[178] In its decree approving the final settlement, the court can allow the guardian up to ten percent of the estate's value as a commission.[179] After the settlement is approved and the estate is delivered to the ward, the liability of the guardian and his surety ends.[180]

V. Conservators

A person who is mentally incapable of managing his estate,[181] or one or more friends of the incompetent, can petition

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[174] *Id.* The chancery court cannot compel parents to support their adult children. Watkins v. Watkins, 337 So. 2d 723, 724 (Miss. 1976) (contempt proceeding not appropriate forum to determine divorced father's liability for support of retarded adult child).

[175] Miss. Code Ann. § 93-13-75 (Supp. 1980).

[176] *Id.* § 93-13-77. Any ward, upon reaching 21 years of age, can petition to waive final settlement and to discharge the guardian and his sureties. The court will grant the petition unless there is reason to believe that the petition was procured by the guardian through fraud or undue influence. *Id.* The guardian must show that there was full disclosure of all relevant information, Gregory v. Orr, 61 Miss. 307, 310 (1883) (suit to compel guardian to show reason for failure to file annual accounts), and that he acted in good faith, Sullivan v. Blackwell, 28 Miss. 737, 742 (1855) (suit alleging that several of the guardian's annual accounts were improper).

[177] Miss. Code Ann. § 93-13-77 (1972). *See* notes 149 through 156 and accompanying text *supra*.

[178] Miss. Code Ann. § 93-13-77 (1972). The ward will be summoned to show why the final account should not be approved. *Id.* The only remaining authority of a guardian after the death of the ward is to submit a final account. South v. United States, 262 F. Supp. 321, 324 (N.D. Miss. 1966) (suit challenging right of guardian to change beneficiary of ward's insurance without authorization). If a guardian has not filed any required annual accounts, however, his final account will not be allowed. Welch v. Childers, 195 Miss. 415, 419-20, 15 So. 2d 690, 691 (1943).

[179] Miss. Code Ann. § 93-13-77 (1972). The guardian is entitled to a commission for all funds that he collects or disburses. Maxwell v. Harkleroad, 77 Miss. 456, 461, 27 So. 990, 991 (1900) (suit challenging commission awarded to guardian). When a guardian has initially asked for no commission because of a settlement with the ward, and this settlement is later set aside, the court can allow the guardian his proper commission. Hudson v. Strickland, 58 Miss. 186, 193 (1880) (suit objecting to commission allowed guardian).

[180] Miss. Code Ann. § 93-13-77 (1972).

[181] *See* notes 9 through 11 and accompanying text *supra*.

the chancery court to appoint a conservator to do so.[182] After giving proper notice,[183] the chancellor conducts a hearing to determine the necessity of a conservator.[184] The estate of the alleged incompetent pays all costs if the petition is sustained, but the petitioner pays the costs if the petition is denied.[185]

A conservator has the same rights, duties, and liabilities as a minor's guardian and is subject to all laws relative to the guardianship of a minor.[186] An incompetent placed under a conservatorship is limited in his power to contract to the same extent as a ward.[187] The assets of the incompetent's estate provide for support and maintenance of the incompetent's dependents.[188]

A conservator may resign or be discharged in the same manner as a minor's guardian and may be discharged if the conservatorship becomes unnecessary.[189] Also, the chancery court can terminate the conservatorship if the incompetent is found to have been restored to reason.[190]

VI. Suggested Changes

By allowing all guardians to assume total control over the

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[182] Miss. Code Ann. § 93-13-251 (1972). The court, in its discretion, can also direct the conservator to take charge of the incompetent. *Id.*

[183] After the petition is filed, the chancery clerk sets a time and place for a hearing, giving at least five days notice to the alleged incompetent, though less notice can be given for good cause. Notice must also be given to the alleged incompetent's spouse or one next of kin, provided the person is a Mississippi resident. If the person to be notified is the petitioner, he must be notified even if he is not a Mississippi resident. Personal service must be given to the one relative and to the alleged incompetent. If the alleged incompetent is entitled to any benefit or income from the Veteran's Administration, the VA must be given notice by personal service. *Id.* § 93-13-253.

[184] *Id.* § 93-13-255. A guardian *ad litem* may be appointed at the court's discretion to represent the alleged incompetent at the hearing. At least two competent physicians, with a minimum of three years actual practice each, must examine the alleged incompetent and must file with the chancery clerk a written report of the examination. *Id.*

[185] *Id.* § 93-13-257.

[186] *Id.* § 93-13-259.

[187] *Id.* § 93-13-261. One whose property is under a conservatorship can execute a valid will during lucid intervals. Lee v. Lee, 337 So. 2d 713, 715 (Miss. 1976) (appeal from decree holding void a will executed by one under conservatorship).

[188] Miss. Code Ann. § 93-13-263 (1972).

[189] *Id.* § 93-13-267.

[190] *Id.* § 93-13-265. For a further discussion of restoration to reason, see note 172 and accompanying text *supra*.

ward or his estate,[191] Mississippi's guardianship statutes assume that all wards are totally disabled. This assumption is unrealistic because there are different degrees of disability. For example, there are varying degrees of mental retardation requiring varying amounts of supervision and care.[192] To remedy this situation, several states recently have adopted statutes that allow appointment of limited guardians.[193]

A limited guardianship allows the court to impose only those limitations on the disabled person as are necessary for his protection and assistance.[194] Kentucky requires that a jury determine whether a disability exists and, if so, the nature and extent of the disability.[195] The State of Washington requires the court, sometimes with the aid of certain state agencies, to investigate the nature and extent of the disability.[196] After this initial determination, both states allow the disabled person to retain all rights which he has been found to be capable of exercising without assistance.[197]

Mississippi's guardianship statutes, as they currently exist, are clearly antiquated and should be amended to incorporate the limited guardianship concept. Limited guardianships should, however, be available only to adult incompetents, as the disability of minority renders a minor totally disabled, regardless of the existence or extent of other disabilities.[198]

The legislature should require that the petition for the adju-

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[191] *See* notes 6, 7 and accompanying text *supra*.

[192] The American Association on Mental Deficiency has established four categories of retardation based on I.Q. These categories are: mild retardation (55-70 I.Q.); moderate retardation (40-54 I.Q.); severe retardation (25-39 I.Q.); and profound retardation (I.Q. below 25). For a further discussion of these classifications, see Dussault, *Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens*, 13 GONZ. L. REV. 585, 592-95 (1978).

[193] *See, e.g.*, KY. REV. STAT. § 387.287 (1970) (authorizing appointment of limited committeeship for adults who are not totally disabled); WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981) (allowing appointment of limited guardian for any person who is not fully incompetent).

[194] *See* Dussault, *supra* note 192, at 605.

[195] KY. REV. STAT. § 203.022 (1970).

[196] WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981).

[197] KY. REV. STAT. § 387.287(3) (1970); WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981).

[198] *See* note 2 and accompanying text *supra*.

dication of incompetency include findings regarding the nature and extent of the alleged disability.[199] The person alleged to be incompetent should then be evaluated by a team of three individuals who would submit their report to the court. This team should consist of a physician to examine the subject's physical condition, a social worker to examine the environment, adaptive behavior and social skills of the individual, and a third member with expertise to evaluate the individual's particular type or types of disability.[200] A state commission should be established to identify and maintain a list of individuals who are both qualified and willing to serve on the evaluation teams.[201]

After receiving the report of the evaluation team, the court should conduct a hearing, to be attended by all interested parties. The purpose of the hearing would be to determine whether a guardianship is warranted in light of the evaluation team's report and, if warranted, the extent of the protection and assistance that should be furnished the incompetent.[202] The court should then impose only those limitations which it finds necessary for the incompetent's protection and assistance.[203]

Following the appointment of a limited guardian, the court should be required to hold periodic hearings to assure that the guardianship continues only as long as is necessary. Such a hearing would also provide an opportunity to adjust the limitations imposed on the disabled person as his or her abilities change.[204]

A second change that should be made in Mississippi's guardianship statutes involves the ability of the guardian to make gifts from the ward's estate for estate planning purposes.[205] A person should not be forced to pay unnecessary estate taxes, against the best interests of his estate, simply because he happens to have been placed under a guardianship or conservatorship.[206] Mississippi should therefore statutorily allow a

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[199] *See* AMERICAN BAR ASSOCIATION, GUARDIANSHIP AND CONSERVATORSHIP 91 (1979).

[200] *See id.* at 82-83.

[201] *See id.* at 86.

[202] *See id.* at 94-95.

[203] *Id.* at 98.

[204] *Id.* at 101.

[205] *See* notes 129 through 131 and accompanying text *supra.*

[206] Strange v. Powers, 358 Mass. 126, 260 N.E.2d 704, 709 (1970) (conservator's peti-

guardian to make gifts from a ward's estate for estate planning purposes as the ward would probably have done, if he had been competent.

These changes are necessary to update Mississippi's guardianship and conservatorship statutes and to protect more effectively the rights of the disabled. The legislature should therefore act as soon as possible to adopt the limited guardianship concept and to allow gifts from a disabled person's estate for estate planning purposes.

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tion to establish estate plan for ward to reduce estate tax liability by making annual lifetime gifts).

RECENT DECISIONS

SEVENTH AMENDMENT—JURY TRIALS—COMPLEXITY EXCEPTION REQUIRED BY PROCEDURAL DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT

Plaintiffs, American producers of consumer electronic products,[1] brought actions alleging that defendants, Japanese electronic products manufacturers,[2] had violated federal antitrust statutes.[3] Plaintiffs sought injunctive relief and compensatory and treble damages.[4] The cases were consolidated,[5] and during pretrial proceedings a group of defendants moved to strike plaintiffs' motion for a jury trial.[6] The United States District Court for the Eastern District of Pennsylvania denied the motion to strike.[7] The district court rejected defendants' contention that even though the seventh amendment guarantees a jury

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[1] Plaintiffs were American corporations which were current or former manufacturers of televisions, tape recorders, radios, and sound systems. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1071-72 (3d Cir. 1980).

[2] Defendants exported many of their goods to the United States for sale. *Id.* at 1071-72.

[3] *Id.* at 1072. It was alleged that defendants had violated the 1916 Antidumping Act, 15 U.S.C. § 72 (1976), the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), the Wilson Tariff Act, 15 U.S.C. § 8 (1976), the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), and the Clayton Act, 15 U.S.C. § 18 (1976). Plaintiffs charged that defendants, by artificially lowering prices on their products, had conspired to drive American television manufacturers from the American market. 631 F.2d at 1072.

[4] 631 F.2d at 1072. Plaintiffs sought to enjoin defendants from further improper conduct. Compensatory damages were sought pursuant to the Lanham Act, 15 U.S.C. § 1125 (1976), which prohibits false designations of the origins of manufactured goods. Treble damages were sought under the Antidumping Act and the Clayton Act. 631 F.2d at 1072.

[5] The suits were consolidated in the Eastern District of Pennsylvania for pretrial proceedings. *In re* Japanese Elec. Prods. Antitrust Litigation, 388 F. Supp. 565 (J.P.M.D.L. 1975). They were later consolidated for trial. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d at 1073.

[6] Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 478 F. Supp. 889, 897 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). For various reasons, certain defendants did not join in the motion to strike. *Id.* The request for jury trial was made pursuant to FED. R. CIV. P. 38(b).

[7] 478 F. Supp. at 929.

trial,[8] the due process clause of the fifth amendment[9] precludes trial by jury where the complexity of a lawsuit forestalls a competent jury verdict.[10] On appeal,[11] the Court of Appeals for the Third Circuit, *held,* vacated and remanded. The procedural due process provisions of the fifth amendment require an exception to the seventh amendment guarantee of a jury trial in a case which is too complex for a jury to decide properly. *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069 (3d Cir. 1980).

The seventh amendment guarantees a jury trial in civil cases where the amount in controversy exceeds twenty dollars.[12] In determining the extent of the seventh amendment guarantee,[13] the Supreme Court traditionally has applied a test based on the common law of England as it existed when the amendment was adopted in 1791.[14] Under this test, if English law did not require a trial by jury, then none was required by the seventh amendment.[15]

In 1959, however, in *Beacon Theatres, Inc. v. Westover,*[16] the Court departed from strict application of its historical test.[17] The

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[8] U.S. CONST. amend. VII.

[9] U.S. CONST. amend. V. The amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law."

[10] 478 F. Supp. at 936-42.

[11] The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b) (1976), which allows a district judge to order an appeal of a decision on a controlling question of law. 478 F. Supp. at 942-46.

[12] U.S. CONST. amend. VII. The amendment states: "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved . . . ."

[13] The problem in interpreting the seventh amendment arises from its use of the word "preserved." Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Decision Making,* 70 NW. U.L. REV. 486, 486 (1975); *see* Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 640 (1973) (term "preserved" requires interpretation).

[14] In Dimick v. Scheidt, 239 U.S. 474 (1935), the Supreme Court stated: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of common law established at the time of the adoption of that constitutional provision in 1791." *Id.* at 476.

[15] Wolfram, *supra* note 13, at 640; *see* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (1791 rules of English common law control); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (seventh amendment protects rights under the common law of England at the time of the amendment's adoption).

[16] 359 U.S. 500 (1959).

[17] *Id.* at 507-10. The historical test has been criticized for its uncertainty of application and effect on judicial administration. *See, e.g.,* Comment, *The Seventh Amendment and Complex Civil Litigation: The Demise of the Complexity Exception to Trial by*

plaintiff in that case sought a declaratory judgment that contracts which gave plaintiff exclusive rights to show "first run" motion pictures did not violate the antitrust laws.[18] In addition, plaintiff sought to enjoin the defendant from instituting antitrust actions against it.[19] Defendant counterclaimed for treble damages, alleging that plaintiff was guilty of antitrust violations.[20] Thus, while the action originally was one in equity, it was broadened to include both legal and equitable claims.[21] Traditionally, any legal issues in such cases were resolved by the judge at the time he ruled on the equitable questions.[22] The Supreme Court, however, required the action to be tried to a jury.[23] The Court reasoned that a litigant should not be deprived of his right to a jury trial of his legal counterclaim simply because the plaintiff brought his suit in equity.[24] The Court's decision in *Beacon Theatres* turned on

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Jury and the Search for a Viable Due Process Alternative, 50 MISS. L.J. 572, 576 (1979) (historical test's application uncertain and difficult); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 114 (1971) (historical test difficult to apply). Application of the historical test has been difficult because the line between law and equity jurisdiction was not definite at the time of the amendment's adoption. In fact, law frequently borrowed from equity, and equity from law. F. JAMES, CIVIL PROCEDURE 340-41 (1965); *see* Redish, *supra* note 13, at 487 (blind adherence to history would place modern judicial administration in historical strait jacket). Even when one knows whether the suit was tried in a law court or equity court, it is often difficult to determine the basis for jurisdiction. *Compare* Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 840-46 (1980) (equity jurisdiction based on inadequacy of common law remedy), *with* Campbell & LePoidevin, *Discussion: Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965, 974-85 (1980) (equity jurisdiction based on complexity of case).

[18] 359 U.S. at 502-03.

[19] *Id.* Plaintiff had been notified of defendant's intent to bring antitrust actions. Plaintiff contended that this notification, through coercion and duress, deprived it of the power to negotiate for exclusive first-run contracts. *Id.*

[20] *Id.*

[21] Plaintiff's demand for injunctive and declaratory relief traditionally would be heard in equity without a jury, Redish, *supra* note 13, at 491-92, while defendant's counterclaim raised legal issues traditionally tried to a jury. 359 U.S. at 504; *accord*, Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 29 (1916) (demand for treble damages is triable only in a court of law).

[22] F. JAMES, *supra* note 17, at 367. If the equitable and legal claims were not factually connected, the issues were tried separately. But where the claims arose from the same circumstances, all issues were decided by the judge in a single bench trial. *Id.* at 367-69; *see* Redish, *supra* note 13, at 492-93 (at common law the chancellor had discretion to order a jury trial of legal issues or to wait until the legal issues were resolved before trying the equitable issues).

[23] 359 U.S. at 508.

[24] *Id.* The Court reasoned that a litigant's right to a jury trial should not turn on the

what it termed the necessity of interpreting the seventh amendment in a modern context.[25] In the Court's view, if the claim was legal under the historical test,[26] or if adequate legal remedies had developed since 1791,[27] then the litigant had a constitutional right to a jury trial of his legal claim.[28]

Beacon Theatres was reaffirmed in *Dairy Queen, Inc. v. Wood*,[29] in which plaintiffs sought an accounting and money damages[30] in an action for breach of trademark agreements.[31] Ordering a jury trial,[32] the Court rejected the equitable "clean-up doctrine,"[33] under which legal issues are resolved by a court of equity without the aid of a jury.[34] The Court alluded to a complexity exception to the seventh amendment and noted that certain cases may involve issues too complex for a jury,[35] but concluded that *Dairy Queen* was not such a case.[36]

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outcome of a race to the courthouse. *Id.* at 504.

[25] The Court considered developments since the adoption of the seventh amendment in determining the extent of jury trial guarantees. It ruled that the existence of "inadequacy of remedy and irreparable harm . . . must be determined, not by precedents decided under discarded procedures, but in light of the remedies now made available . . . ." *Id.* at 507. *See* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 6-7 (1967) (decision recognizes that formerly inadequate legal remedies may have become adequate).

[26] *See* notes 14, 15 and accompanying text *supra*.

[27] The Federal Rules of Civil Procedure expanded the legal remedies available to litigants. 359 U.S. at 509-10; *accord*, Prudential Ins. Co. v. Saxe, 134 F.2d 16, 31-34 (D.D.C.) (federal rules allow for joinder of legal and equitable claims, and also for compulsory legal counterclaims in equitable matters), *cert. denied*, 319 U.S. 745 (1943).

[28] 359 U.S. at 509.

[29] 369 U.S. 469 (1962).

[30] *Id.* at 475, 479. Equity dealt with claims for collection of a debt or for monetary compensation with an action for an accounting. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 65 (1980). The accounting was exclusively an equitable remedy. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 221-22 (2d ed. 1899); J. WILSON, THE WORKS OF JAMES WILSON 145 (1896) (accountings were never tried to a jury).

[31] 369 U.S. at 473-74. Plaintiff claimed that defendant had defaulted on payments due under a contract which licensed the use of the trademark "Dairy Queen." *Id.*

[32] *Id.* at 479.

[33] *Id.* at 479-80. *But see* 5 J. MOORE FEDERAL PRACTICE ¶ 3.16[4] at 162.9 n.9 (2d ed. 1979) (application of clean-up doctrine allowed after *Dairy Queen*).

[34] The "clean-up" doctrine permitted a court of equity to resolve both legal and equitable issues in a case, once the equity court had obtained jurisdiction. Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 320 (1951); *see* Note, *Constitutional Law—Federal Rules—Right to Civil Jury Trial*, 15 ALA. L. REV. 562, 565-66 (1963) (equity retains the suit and grants entire relief, even though some legal matters are determined in the process).

[35] 369 U.S. at 478. The Court said: "[I]n order to maintain a suit . . . cognizable at

The argument in favor of a complexity exception gained impetus in *Ross v. Bernhard*.[37] There, plaintiffs in a stockholders' derivative action[38] sought an accounting and reimbursement for losses which resulted from defendants' mismanagement.[39] As in *Beacon Theatres* and *Dairy Queen*, both legal and equitable issues were presented.[40] The Supreme Court ordered a jury trial,[41] holding that it was not the character of the overall action that controlled the seventh amendment question, but rather the nature of the specific issues to be tried.[42] In a footnote, the Court fashioned a three-prong test to determine whether the nature of an issue was legal or equitable.[43] Under the test, whether a litigant is entitled to a jury trial is determined by the customary treatment of the issue prior to the merger of law and equity, the remedy sought, and the practical limitations and abilities of juries.[44]

Several lower courts have elected to follow the *Ross* test in determining the seventh amendment question. In *In re Boise Cascade Securities Litigation*,[45] the district court, denying a jury trial of the case,[46] held that *Ross* had recognized an exception to the seventh amendment.[47] The court, following the *Ross* test, reasoned that the

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law, . . . the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *Id.* (footnote omitted). *Accord*, Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887) (must conclude jury is unable to understand facts before case can be tried to a judge).

[36] 369 U.S. at 478-79.

[37] 396 U.S. 531 (1970).

[38] *Id.* at 531-32.

[39] *Id.* at 532. Plaintiffs alleged that defendants' actions had amounted to "waste and spoliation." *Id.*

[40] *Id.* at 542.

[41] *Id.*

[42] *Id.* at 538. The Court stated: "[T]here is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." *Id.* (citing *Beacon Theatres* and *Dairy Queen*). The decision has been labeled "the culmination of the Court's deviation from the historical test." Note, *Jury Trial in Stockholders' Derivative Suit*, 65 NW. U.L. REV. 697, 701 (1970) (extension of jury trial to suits traditionally heard in equity was a major change from historical treatment).

[43] 396 U.S. at 538 n.10.

[44] The Court stated: "[T]he 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* According to the Court, the first test, the traditional historical test, would be the most difficult to determine. *Id.*

[45] 420 F. Supp. 99 (E.D.N.Y. 1976).

[46] *Id.* at 105.

[47] The court was of the opinion that the *Ross* footnote was "of constitutional pro-

complexity of the case, which involved a consolidation of securities fraud actions,[48] exceeded the practical ability of a jury to reach an informed and impartial verdict.[49] In *Bernstein v. Universal Pictures, Inc.*,[50] involving alleged violations of federal copyright and antitrust laws,[51] the district court held that the third prong of the *Ross* test was no more than a restatement of the traditional equity powers of courts,[52] which include the power to assume jurisdiction over complex cases.[53] In denying a jury trial of the action, the court cited the anticipated length of trial, the large number of litigants, and the nature of the damages as contributing to the prohibitive complexity of the case.[54] In *ILC Peripherals Leasing Corp. v. IBM*[55] plaintiffs charged IBM with monopolizing certain segments of the computer industry.[56] A mis-

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portions." *Id.*

[48] Several plaintiffs charged that Boise Cascade, its accountant, officers, and directors had violated federal antitrust laws. The cases were consolidated for trial, and a special master was appointed to supervise discovery. *Id.* at 101.

[49] *Id.* at 104-05. The district court reasoned that the anticipated length of trial would preclude employed persons from jury service, thus destroying the "appearance of fairness" by eliminating those familiar with business. The court held further that because a sizable portion of the community would be excluded from service, the jury's collective background and knowledge would be extremely limited. The court concluded that since it could utilize tools unavailable to a jury, including review of daily transcripts and testimony from reporter's notes, personal questioning of witnesses, and admission of depositions into evidence, it was more capable of deciding the case fairly and competently than the jury. *Id. But see* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 50 (jury more capable than judge to hear complex case).

[50] 79 F.R.D. 59 (S.D.N.Y. 1978).

[51] *Id.* at 61-62. A class of composers and lyricists charged that certain producers and distributors of television programs and motion pictures had conspired to restrain trade by depriving plaintiffs of the copyright to their work. Additionally, plaintiffs alleged that defendants violated federal antitrust laws by monopolizing the American motion picture and television industry. *Id.*

[52] For a thorough discussion of the traditional equity powers of courts, see Arnold, *supra* note 17; Campbell & LePoidevin, *supra* note 17.

[53] *Id.* The district court reasoned that at common law a judge could reserve for himself cases involving complex writings, especially in regions where illiteracy rendered jurors incapable of understanding the issues of the case. The district court cited Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603), as an early example of this form of equity jurisdiction. *See* Campbell & LePoidevin, *supra* note 17, at 974-85 (bench trial granted because of case's complexity). *But see* Arnold, *supra* note 17, at 840-46 (inadequacy of legal remedy was the basis for equity jurisdiction).

[54] 79 F.R.D. at 70.

[55] 458 F. Supp. 423 (N.D. Cal. 1978).

[56] *Id.* at 426. In controversy were such matters as what constituted a "market," whether prices charged by IBM on specific and highly technical computer components

trial was declared when the jury was unable to reach a verdict,[57] and on retrial the district court held, under the authority of *Ross*,[58] that the case was too complex to be tried to a jury.[59]

While the courts in *Boise Cascade, Universal Pictures,* and *ILC Peripherals* interpreted *Ross* as creating a complexity exception to the seventh amendment,[60] other courts have forsworn this conclusion. In *Radial Lip Machine, Inc. v. International Carbide Corp.*,[61] an action for patent and trademark infringement and breach of contract,[62] the district court flatly rejected *Boise Cascade's* interpretation of the *Ross* test.[63] The court held that *Ross* did not contemplate consideration of the complexity of individual law suits.[64] Instead, the court said the *Ross* test was intended to be employed only in answering the threshold question of whether an entire class of legal claims was too complex to be tried to a jury.[65] The court concluded that the complexity of the

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were predatory, and whether IBM's introduction of certain products into the market was anticompetitive. *Id.* at 426-36.

[57] The trial lasted five months, and after 19 days of deliberation the jury announced that it was deadlocked and could not reach a verdict. *Id.* at 448.

[58] *Id.*

[59] *Id.* at 426-27. The district court found that the jurors had failed to understand much of the evidence presented in the case, including the testimony of several expert witnesses, and that most of the jurors indicated that they thought the case should have been tried to the court. *Id.* at 444-47. The court reasoned that the situation presented in *ILC Peripherals* differed from that presented in *Boise Cascade* and *Bernstein.* In those cases, jury trials were denied because it was likely the cases were too complex for a jury. In *ILC Peripherals,* the case had been tried to the jury and had proved too complex for a jury to handle. The court feared that if the case were again tried to a jury, the jury would feel compelled to reach a decision, even if the case proved too difficult or impossible for it to understand. The court noted that such a verdict was likely to be arbitrary and concluded that while the seventh amendment guarantees the right to a jury trial of every case, the right should be limited to one jury trial. *Id.* at 447-48.

[60] For cases adopting a similar interpretation, see Cleverly v. Western Elec. Co., 69 F.R.D. 348, 350-53 (W.D. Mo. 1975) (jury trial denied because of complexity of suit under Age Discrimination in Employment Act), *aff'd,* 594 F.2d 638 (8th Cir. 1979); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794, 796-97 (W.D. Wis. 1975) (complexity of copyright infringement case sufficient to deny jury trial).

[61] 76 F.R.D. 224 (N.D. Ill. 1977).

[62] The lawsuit arose from corporate transactions which transferred patent rights and created contractual obligations between the parties. *Id.* at 225-26.

[63] *Id.* at 227. The court viewed the *Boise Cascade* interpretation as leading to an intolerable dilution of the right to jury trial. *See* Higginbotham, *supra* note 49, at 54-60 (jury lends fairness and flexibility to judicial system).

[64] 76 F.R.D. at 227.

[65] *Id.* at 229. *But see* Note, *The Right to Jury Trial in Complex Cases,* 92 HARV. L. REV. 898, 912 (1979) (*Ross* test should be applied on case by case basis and not to general class of claims).

claim at issue in *Radial Lip* did not surpass the practical ability of a jury.[66]

The Ninth Circuit rejected *Ross* in *In re United States Financial Securities Litigation*.[67] There, purchasers of defendant's debenture and stock offerings charged defendant with violations of federal and state securities laws, fraud, and negligence.[68] Directing a jury trial,[69] the court expressed doubt that the Supreme Court would cast aside a two hundred year old historical test in a footnote,[70] and held that the footnote in *Ross* was never intended as the basis for an exception to the seventh amendment.[71] Noting that the Supreme Court had never invoked the *Ross* test,[72] the Ninth Circuit chose instead to employ the

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[66] 76 F.R.D. at 229.

[67] 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980).

[68] 609 F.2d at 414-16.

[69] *Id.* at 432.

[70] *Id.* at 425.

[71] *Id.* Commentators have also expressed doubt about the precedential value of the *Ross* test. *See, e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 454 (3d ed. 1976) (*Ross* test considered invalid); Redish, *supra* note 13, at 526 (footnote so devoid of authority and analysis as to be nonbinding); Note, *supra* note 17, at 126-30 (Supreme Court's failure to apply *Ross* is indicative of test's lack of importance as a precedent); 24 CASE W. RES. L. REV. 406, 415-16 (1973) (*Ross* test's constitutional stature doubtful).

[72] The Ninth Circuit cited five cases in which the Supreme Court could have employed the *Ross* test, but did not. 609 F.2d at 426 n.48. In Parklane Hosiery v. Shore, 439 U.S. 322 (1979), a stockholders' derivative action, the Court held that a request for a jury trial should have been denied where the request was for an advisory jury in equity and not for a trial jury at law. The Court failed to mention *Ross* in its analysis of the jury trial issue. *Id.* at 333-37.

Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), involved an appeal of an administrative penalty under the Occupational Safety and Health Act. The Court's opinion focused on the scope of the seventh amendment and not on the limitations of juries. The Court held that Congress may assign adjudication of "public rights" created by statute to administrative agencies, in which case a jury trial is not guaranteed by the seventh amendment. *Id.* at 450.

Another statutory right, the right of a landlord in the District of Columbia to evict a tenant for nonpayment of rent, was considered by the Court in Pernell v. Southall Realty, 416 U.S. 363 (1974). The tenant's request for a jury trial had been denied. The Supreme Court held that the statute, in creating the landlord's remedy, created an action at law. The Court employed the historical test instead of the *Ross* test and analogized the statutory action with an action at law. Because the action was a legal one, the Court concluded the seventh amendment guaranteed a jury trial. *Id.* at 384-85.

The plaintiff in Curtis v. Loether, 415 U.S. 189 (1973), brought a civil action charging the defendant with violating Title VII of the Civil Rights Act. Her request for a jury trial was denied. The Supreme Court reversed, holding that if a statute creates legal rights, enforceable in actions for damages in a court of law, then the seventh amendment guarantees a right to a jury trial. *Id.* at 194.

Montana's statutory provision for a six-member civil jury was challenged in Colgrove

traditional historical test[73] and found no reason for denying a jury trial.[74] While the court acknowledged the existence of a right to a competent finder of fact,[75] it rejected the argument that a jury trial of the case would infringe the fifth amendment due process rights of the litigants.[76] The court concluded that the complexity of the case at hand did not preclude a competent jury verdict.[77]

In the instant case, the court held that since no statutory right to trial by jury exists under the antitrust laws,[78] and since the *Ross* test is of questionable constitutional import,[79] the traditional historical

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v. Battin, 413 U.S. 149 (1973). The Court held that a six-member jury was capable of dispensing justice and upheld the statute. *Id.* at 160.

[73] *See* notes 14, 15 and accompanying text *supra*.

[74] The court found that antitrust actions are cognizable at law and not in equity. 609 F.2d at 431-32.

[75] The court "assume[d], without deciding, that there is such a right to a 'competent' fact-finder." *Id. See* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry*?, 70 F.R.D. 199, 208 (1976) ("Due process of law entails a process under which litigated matters will be decided by an arbiter within whose competence they lie.").

[76] Appellees contended that, because of the magnitude and size of the litigation, a jury would not be able to make a rational decision. 609 F.2d at 427. Appellees theorized that the fifth amendment required "fairness" in judicial proceedings. *Id.* Commentators have agreed with this contention. *See, e.g.*, Comment, *supra* note 17, at 600 (fair trial requires that finders of fact be able to comprehend the issues and render a rational verdict).

The Supreme Court has recognized that due process includes the principles of fairness. *See, e.g.*, Hannah v. Larche, 363 U.S. 420, 422 (1960) (due process requires fairness); Kinsella v. United States, 361 U.S. 234, 246 (1960) (unfairness a violation of due process); Galvin v. Press, 347 U.S. 522, 530 (1954) (fairness required by due process). In *United States Financial*, appellees took the position that trying the case to an arguably incompetent jury would offend principles of fairness and thereby violate the due process requirements of the fifth amendment. 609 F.2d at 427.

[77] 609 F.2d at 427. The court observed that there are procedures by which a complex case could be made less unwieldy. For example, attorneys could organize information and present it in an understandable form to the jury. The court observed further that "attorneys may do a better job of trying a complex case to a jury than to a judge." *Id.* (footnote omitted). *See* Higginbotham, *supra* note 49, at 54-55 (jury's presence encourages clear presentation of facts during trial).

The MANUAL FOR COMPLEX LITIGATION (4th ed. 1977) suggests several methods for organizing and controlling complex proceedings. A trial court may also appoint a special master to assist the jury under the Federal Rules of Civil Procedure. FED. R. CIV. P. 53(b). For other methods by which a complex case may be simplified, see generally Note, *supra* note 65, at 918.

[78] The court examined the language of the statutes and found no jury trial requirements. 631 F.2d at 1075-76. Additionally, it found nothing in the legislative history of the statutes indicating an intent to guarantee a jury trial. *Id.* at 1076.

[79] *See* notes 70 through 72 and accompanying text *supra*.

test[80] should be employed in seventh amendment questions.[81] The court further held that since, under the historical test, antitrust actions are cognizable at law and not in equity,[82] the seventh amendment guarantees the right to a jury trial of antitrust cases.[83] The court concluded, however, that since fifth amendment due process entitles a litigant to a competent finder of fact,[84] the seventh amendment must yield to the fifth in cases too complex for a jury to understand.[85]

The dissenting judge contended that since denial of a jury trial on due process grounds allows broad discretion by the trial judge,[86] and since there is no guarantee that an erroneous denial of a jury trial will be overturned,[87] the majority decision constitutes an unacceptable alteration of the nature of the judicial process.[88]

The instant case seems to establish complexity as a constitutionally compelled limitation on the seventh amendment guarantee of a jury trial. The court, while stating that "it [was] unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion,"[89] nonetheless decided that the *Ross* footnote indicated the Court's receptiveness to an exception to the broad seventh amendment guarantee.[90] At the very least, the Court of Appeals for the Third Circuit has stated that a jury's competence is an issue in determining whether a case is to be given a bench or jury trial. While *Ross* did not specify the scope and purpose

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[80] *See* notes 14, 15 and accompanying text *supra*.

[81] 631 F.2d at 1079-80.

[82] *See* notes 20, 21 and accompanying text *supra*.

[83] 631 F.2d at 1079.

[84] *See* notes 75, 76 and accompanying text *supra*.

[85] 631 F.2d at 1089. The circuit court did not define "too complex."

[86] The dissent expressed fear that a trial judge's decision might be colored "by unarticulated sympathies for or hostilities toward the underlying policies sought to be advanced in the lawsuit." *Id.* at 1093 (Gibbons, J., dissenting). *See* Higginbotham, *supra* note 49, at 49-50 (seventh amendment intended to temper judges' arbitrary powers); Note, *supra* note 65, at 913-14 (most judges' decisions influenced by personal bias).

[87] 631 F.2d at 1093 (Gibbons, J., dissenting). An erroneous denial of jury trial may be corrected by issuance of a writ of mandamus. *Id.* Judge Gibbons predicted, however, that this would prove ineffective in preventing erroneous determinations of seventh amendment questions. He emphasized that mandamus is difficult to obtain and expressed concern that appellate courts might be reluctant to overturn the verdict of a judge in an otherwise error-free trial. Judge Gibbons concluded that in cases relying on the majority decision few, if any, mistakes on the jury trial question would be corrected. *Id.*

[88] *Id.*

[89] *Id.* at 1080.

[90] *Id.*

of the inquiry into complexity, the instant case uses it as a guide to projecting the procedural dictates of the fifth amendment into the seventh amendment right to a jury, and thereby gives the *Ross* test constitutional status.

On the surface, the instant decision would seem to be irreconcilable with the Ninth Circuit's decision in *United States Financial.* In *United States Financial,* however, the court did not reject the idea of a complexity exception; on the contrary, it acknowledged the right to a competent jury.[91] That court simply could not accept a mere footnote as giving rise to an exception of constitutional proportions.[92] In a case with the proper fact situation, however, it might have accepted a due process analysis.

The court's use of the *Ross* test in the instant case directs the lower courts in the Third Circuit to make a functional inquiry in each case to keep the jury trial determination within the bounds of procedural due process. Moreover, in those jurisdictions accepting the complexity exception, the courts are relieved of the elusive remnants of the historical law-equity distinction[93] and provided with a comprehensive test based on the nature of the issue, the remedy sought, and the practical abilities and limitations of the jury.[94]

Because of the complexity of the issues involved in protracted commercial litigation, such as antitrust, securities, and patent cases, it is reasonable to forecast a procedural trend to nonjury trials. This would be a departure from the policy of incorporating into the trial the collective wisdom, civic experience, and community values of the jury, but a lengthy, very complex trial produces the same effect; protracted litigation effectively precludes participation in the legal process by a fair cross-section of the community.

Since the court remanded the instant case for a determination of complexity without delineating the factors sufficient to render a jury incompetent, it implicitly ruled that the exception should be applied on a case by case basis. Consequently, in every action governed by the complexity exception, jury competence will be decided according to the specific factual problems presented. It will, therefore, be difficult for the lower courts to apply the exception. It may be advisable for courts to determine initially whether innovative trial techniques can help to simplify a complex case and bring it within the competence of a jury.

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[91] *See* note 75 and accompanying text *supra.*

[92] *See* notes 70, 71 and accompanying text *supra.*

[93] *See* note 17 *supra.*

[94] *See* note 44 *supra.*

This may be a less drastic means of accommodating the guarantees of the fifth and seventh amendments than resort to a complexity exception. Since such an exception does, however, provide constitutional protection against an irrational jury verdict, the Supreme Court may find sufficient justification for hearing and affirming the instant case, and thus put a vigorously contested constitutional issue to rest.

Lauren Gordon Alexander
Gretchen Welsch Pumphrey

Civil Rights—Federal Jurisdiction—Exhaustion of Adequate and Appropriate State Administrative Remedies is a Prerequisite For Judicial Review Under Section 1983

Georgia Patsy, a white female secretary, brought a civil rights action under section 1983 of title 42 of the United States Code[1] against Florida International University[2] in the United States District Court for the Southern District of Florida, alleging employment discrimination in violation of the Constitution and laws of the United States.[3] The district court dismissed the action for failure to exhaust state administrative remedies.[4] The Court of Appeals for the Fifth Circuit reversed on the ground that failure to allege exhaustion of state remedies did not preclude a section 1983 cause of action.[5] On rehearing en banc, the court of appeals, *held*, vacated and remanded.[6] Absent any of the

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[1] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiff asserted jurisdiction under 28 U.S.C. § 1343(a)(3), the jurisdictional counterpart of 42 U.S.C. § 1983. 28 U.S.C. § 1343(a)(3) (Supp. III 1979) provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States
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> . . . .

[2] Suit was filed against the Board of Regents of the State of Florida on behalf of Florida International University. Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981).

[3] Plaintiff alleged that she was discriminated against on the basis of her race and sex in being rejected for jobs for which she was qualified. She further contended that individuals from minority groups were hired and promoted to the exclusion of more qualified individuals. *Id.*

[4] *Id.*

[5] Patsy v. Florida Int'l Univ., 612 F.2d 946, 946-47 (5th Cir.), *rehearing granted*, 617 F.2d 442 (1980), *vacated and remanded en banc*, 634 F.2d 900 (1981).

[6] 634 F.2d at 914. The court of appeals reheard the case en banc to decide whether to adopt an automatic no-exhaustion rule in section 1983 cases or to adhere to a more

traditional exceptions to the general rule of exhaustion, all adequate and appropriate state administrative remedies must be exhausted before actions can be brought under section 1983. *Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981).

Section 1983, enacted as part of the Civil Rights Act of 1871,[7] was promulgated to provide a private federal remedy for deprivation of rights under color of state law.[8] Initially the statute was seldom utilized because of the strict interpretation applied to it by the Supreme Court.[9] In the 1940's, however, the Court began to broaden its interpretation of the statute by redefining the phrase "under color of law."[10]

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flexible rule of exhaustion "in appropriate cases." *Id.* at 902.

[7] Section 1983 was originally § 1 of the Ku Klux Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Monroe v. Pape, 365 U.S. 167, 171 (1961). The source of the statute was a message to Congress by President Grant on March 23, 1871 declaring:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Id. at 172-73 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

[8] See note 1 *supra*. The immediate purposes of the Civil Rights Act were to prevent invidious discrimination by the states against their citizens, to provide an adequate remedy where one was lacking in the state law, and to provide a federal remedy where a state remedy existed in theory but not in practice. Monroe v. Pape, 365 U.S. 167, 173-74 (1961). For a discussion of the legislative history of the Civil Rights Act, see Gressman, *The Unhappy History of the Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

[9] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (declaring the first and second sections of the Civil Rights Act void because they were not authorized by the thirteenth or fourteenth amendments); United States v. Harris, 106 U.S. 629, 644 (1883) (no cause of action established because statutes arising from the Civil Rights Act were declared unconstitutional for lack of authority).

[10] *See, e.g.*, Screws v. United States, 325 U.S. 91, 111 (1945) ("under color of law" redefined to mean "under pretense of law," which included official acts of public officers whether or not within scope of their authority); United States v. Classic, 313 U.S. 299, 326 (1941) (misuse of power when the wrongdoer is clothed with the authority of state law is action "under color of" state law); Hague v. C.I.O., 307 U.S. 496, 531-32 (1939) (federal courts have jurisdiction over suits authorized by law to be brought under § 1983).

The Court's interpretations of the "under color of law" language of § 1983 were taken collectively to mean that actions of public officials fell "under color of law" regardless of whether they were (1) beyond the scope of authority, (2) within the scope of authority but conducted in a manner prohibited by the Constitution, or (3) within a

Thus, litigants were afforded easier access to a federal forum.[11]

On its face, section 1983 appears to provide an ideal cause of action for the civil rights litigant.[12] The statute has been limited, however, by the occasional requirement that the plaintiff exhaust state administrative remedies before bringing suit in federal court.[13] One of the reasons advanced for requiring exhaustion is that administrative agencies are best able to make determinations of fact.[14] Presumably, after such a factual determination, the case can be decided in an orderly manner, either by an administrative agency or by the courts.[15]

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scope of authority that was constitutionally void. Monroe v. Pape, 365 U.S. 167, 183-202 (1961).

[11] *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169 (1977) (result of decisions was greater availability of § 1983 actions for victims of police misconduct and for redress of first amendment violations). In the years following this initial expansion, the substantive scope of the section was gradually broadened by the incorporation of some of the guarantees of the first ten amendments into the fourteenth amendment's due process clause and by development of the due process and equal protection doctrines. *Id.*

[12] Any person deprived of a federal or constitutional right may bring suit under § 1983 if some form of state action is involved. This requirement is met when the state government is directly or indirectly involved. *See, e.g.*, Green v. Dumke, 480 F.2d 624, 628-29 (9th Cir. 1973) (relevant inquiry focuses on whether the authority of the state was exerted in enforcing the law); Lorentzen v. Boston College, 440 F. Supp. 464, 465 (D. Mass. 1977) ("state action" is essential element of cause of action under § 1983), *cert. denied*, 440 U.S. 924, *rehearing denied*, 441 U.S. 917 (1979). *See also* Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 569-70 (1975) (provisions and use of § 1983). When the state is directly involved, those who participate with the state may also be liable. *E.g.*, United States v. Price, 383 U.S. 787, 795-96 (1966) (private citizens acted under color of law when they acted in concert with police); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980) (private party conspiring with state official liable under § 1983); Fine v. City of New York, 529 F.2d 70, 73-77 (2d Cir. 1975) (attorney participating in police raid acted under color of law); Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872, 878-79 (E.D. Wis. 1977) (private party acting with state officials acted under color of law for purposes of § 1983).

[13] *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1498-1501 (1969) (exhaustion of state administrative remedies once black letter law, now only an occasional requirement).

[14] *See* McGee v. United States, 402 U.S. 479, 490-91 (1971) (petitioner's failure to take administrative appeal deprived the draft board of an opportunity to apply its expertise). It has been postulated that administrative agencies should serve as expert supervisory bodies because they are more familiar with local factors affecting the suit. In addition, administrative remedies are generally less costly than federal judicial remedies, as well as more efficient and expedient. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.02 (3d ed. 1972).

[15] *See* Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973) (the exhaustion requirement is grounded in substantive concerns not only of fairness and orderly procedure, but also of competency; specialized agencies, not the courts, are best equipped to

The requirement of exhaustion has been subject to a number of exceptions.[16] First, the administrative agency must have jurisdiction over the controversy before the doctrine will be applicable.[17] Second, exhaustion of state judicial, as distinguished from administrative, remedies has not been required.[18] Third, the requirement has been waived

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serve this function).

[16] McKart v. United States, 395 U.S. 185, 193 (1969). The Court also noted that "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *Id.*

[17] *See* Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 89 (1958) (exhaustion not required when agency involved lacks jurisdiction); Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919) (exhaustion not required in suit to enjoin alleged ultra vires agency action). *But see* Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 166 (1967) (exhaustion required in suit to enjoin alleged ultra vires agency action). One may challenge an agency's jurisdiction prior to completion of the administrative process when the agency's action is (1) unauthorized by statute, (2) unconstitutional, or (3) based on an allegedly unconstitutional authorizing statute. *See* K. DAVIS, *supra* note 14, § 20.02-.04, at 383-89.

[18] *See* Lane v. Wilson, 307 U.S. 268, 274 (1939) (absent exceptional circumstances or explicit statutory requirements, it is not necessary to exhaust state judicial remedies); Dove v. Parham, 282 F.2d 256, 262 (8th Cir. 1960) (not necessary to exhaust state judicial remedies to vindicate federal constitutional rights unless federal statute so requires). *But cf.* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967) (federal court will not hear a suit in equity where there is an adequate remedy at law in state court); Wright v. McMann, 257 F. Supp. 739, 747 (N.D. N.Y. 1966) (plaintiff must exhaust state court remedies in § 1983 case before the court may assume jurisdiction), *rev'd on other grounds*, 387 F.2d 519, 522-24 (2d Cir. 1967) (intimation that lower court was wrong, and exhaustion of state judicial remedies should not be required); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1266-72 (1977) (noting renewed attentiveness to availability of adequate state judicial remedies in the resolution of § 1983 cases).

When state judicial remedies are involved, the underlying rationale for the exception to the exhaustion requirement is that judicial remedies are essentially interchangeable. While § 1983 states a cause of action, 28 U.S.C. § 1343(3) provides original, but not exclusive, jurisdiction in the federal courts. Therefore, state courts may exercise concurrent jurisdiction, although § 1983 claims are subject to removal to federal court. *See* Rzeznik v. Chief of Police of Southhampton, 373 N.E.2d 1128, 1134 n.8 (Mass. 1978) (§ 1983 state court concurrent jurisdiction presumed); Board of Trustees v. Holson, 584 P.2d 1009, 1017 (Wyo. 1978) (state courts have concurrent jurisdiction in § 1983 actions). If the plaintiff is required to exhaust state judicial remedies, he will be precluded from bringing his § 1983 claim in federal court because of the collateral estoppel or res judicata effects of the state court determination. Robbins v. District Court, 592 F.2d 1015, 1018 (8th Cir. 1979) (state court holding in identical § 1983 action held res judicata). This collateral estoppel/res judicata effect does not apply to state administrative determinations since neither state nor federal courts are bound by a state administrative decision. *See* Lane v. Wilson, 307 U.S. 268, 274 (1939) (judicial proceedings do not confer upon the courts any of the discretionary or initiatory functions that are characteristic of administrative agencies). *See also* Comment, *Exhaustion of State Administrative Reme-*

when the administrative remedy was clearly inadequate, unnecessary, or futile.[19] Fourth, exhaustion has not been required when the claimant alleged that the administrative remedy itself was unlawful or unconstitutional.[20] Fifth, where a plaintiff sought to have a legislative act declared unconstitutional and the administrative remedy would leave the constitutional question standing, exhaustion has not been required.[21] Finally, the requirement has been waived when the litigant would be subject to irreparable injury as a result of lengthy administrative proceedings that provided no interim relief.[22]

The general exhaustion requirement, although well-established,[23] had not been tested for section 1983 purposes[24] prior to the 1961 Su-

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dies in Section 1983 Cases, 41 U. CHI. L. REV. 537, 541-42 (1974) (res judicata effect of state judicial determinations).

[19] *See, e.g.*, McKart v. United States, 395 U.S. 185, 197-98 (1969) (where the controversy involves only a question of statutory interpretation and there is no need for application of administrative interpretation or expertise, exhaustion is not required); Walker v. Southern Ry., 385 U.S. 196, 198 (1966) (administrative remedy resulting in 10-year delay in decision need not be exhausted); Buffalo Teachers Fed., Inc. v. Helsky, 435 F. Supp. 1098, 1103 (S.D.N.Y. 1977) (adequate administrative remedies must be pursued unless futile). *See generally* K. DAVIS, *supra* note 14, § 20.07, at 391-92 (discussion of inadequacy of administrative remedies).

[20] *See, e.g.*, Fuentes v. Roher, 519 F.2d 379, 387 (2d Cir. 1975) (exhaustion is not required where question of adequacy of administrative remedy is coextensive with the merits of the plaintiff's constitutional claim); Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974) (exhaustion not required in situations where the administrative procedure under attack is the one which the agency says must be exhausted); Salkay v. Williams, 445 F.2d 599, 601 (5th Cir. 1971) (exhaustion of administrative remedy not required where Supreme Court has ruled nearly identical procedure unconstitutional).

[21] *See* Public Utils. Comm'n v. United States, 355 U.S. 534, 539-40 (1958) (where the only question is whether it is constitutional to require the litigant to pursue an administrative remedy, the administrative agency may be defied and judicial relief sought). *See generally* K. DAVIS, *supra* note 14, at § 20.04.

[22] *See* Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923) (plaintiffs would not have adequate remedy for what they might lose before court acts).

[23] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (it is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until prescribed administrative remedies have been exhausted). The exhaustion requirement has been applied most frequently in cases in which injunctive relief was sought. *See, e.g.*, Dalton Adding Mach. Co. v. State Corp. Comm'n, 236 U.S. 699, 700-01 (1915) (affirming ruling that injunction will not lie where administrative remedies are not exhausted); Pittsburgh, C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 44-45 (1898) (administrative agency must reach decision before court will decide whether to issue an injunction).

[24] Prior to 1961 the Court had strongly implied but never specifically ruled that exhaustion is required in § 1983 cases. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 274 (1939) (state administrative remedies normally must be completed before resort to federal courts); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (not entitled

preme Court decision in *Monroe v. Pape*.[25] There, the Court stated in dictum that state remedies need not be exhausted before a litigant is entitled to a federal remedy.[26] In *Monroe*, Chicago police illegally searched a black citizen's home.[27] The plaintiff sought damages under section 1983.[28] In holding that the federal court had jurisdiction, the Supreme Court determined that the policemen had acted under color of state law,[29] and, therefore, the plaintiff was not required to exhaust state remedies before seeking a federal forum.[30] At issue, however, was exhaustion of state judicial, rather than administrative, remedies.[31] Thus, while *Monroe* is properly limited to its finding that exhaustion of state judicial remedies is not required,[32] subsequent decisions have construed the broad language used by the Court as establishing a no-exhaustion policy for both state judicial and administrative remedies in section 1983 cases.[33]

The liberal interpretation of *Monroe v. Pape* was fortified by *McNeese v. Board of Education*.[34] In *McNeese*, a group of black students brought suit in federal court under section 1983 alleging racial discrimination and demanding equitable relief.[35] The district court dis-

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to judicial relief until prescribed administrative remedy has been exhausted).

[25] 365 U.S. 167 (1961).

[26] *Id.* at 183.

[27] *Id.* at 169.

[28] *Id.*

[29] *Id.* at 183-87. Another issue was whether the City of Chicago could be sued as a person under § 1983. The Court held that it could not. *Id.* at 187. The decision on that issue was later overruled by Monell v. Department of Social Servs., 436 U.S. 658, 690, 701 (1978).

[30] 365 U.S. at 183. The Court, in reaching this decision, examined the history and purposes behind § 1983. *See* note 8 *supra*. One purpose was to provide a federal remedy where the state remedy was inadequate; but because the state remedy here was adequate, the plaintiff ordinarily would have been required to exhaust his state judicial remedy. The Court concluded, however, that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183.

[31] The suit could have been brought in state court since unreasonable searches and seizures were unlawful under Illinois law. 365 U.S. at 183.

[32] *See* notes 18, 30 and accompanying text *supra*.

[33] *See, e.g.*, Houghton v. Shafer, 392 U.S. 639, 640-41 (1968) (resort to administrative remedies is unnecessary in light of *Monroe v. Pape*); King v. Smith, 392 U.S. 309, 312 n.4 (1968) (plaintiff bringing action under § 1983 is not required to exhaust administrative remedies where the constitutional challenge is sufficiently substantial); *cf.* Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967) (exhaustion is not required when only legal relief is sought).

[34] 373 U.S. 668 (1963).

[35] *Id.* at 669-71.

missed the action for failure to exhaust administrative remedies; the court of appeals affirmed.[36] The Supreme Court reversed,[37] citing *Monroe* for the proposition that exhaustion of state administrative remedies was not necessary in section 1983 cases.[38] The Court qualified its holding, however, explaining that the state administrative remedy was inadequate and afforded only "tenuous protection" to the plaintiff's civil rights.[39]

Four years after *McNeese*, the Court was again urged to reconsider the exhaustion issue. In *Damico v. California*,[40] a group of welfare claimants challenged a state welfare law which required a three-month waiting period following the father's desertion before welfare benefits could be received under the California Aid to Families with Dependent Children Program.[41] A three-judge federal district court panel dismissed the complaint for failure to exhaust state administrative remedies.[42] In a per curiam opinion, the Supreme Court reversed, citing *Monroe* and *McNeese*.[43]

After *McNeese* and *Damico*, the exhaustion requirement in section 1983 cases appeared to be a dead issue.[44] In the early 1970's, however, two cases[45] were decided which indicated a change of direction from the Court's earlier liberal attitude toward exhaustion.[46]

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[36] *Id.* at 670.

[37] *Id.* at 676.

[38] *Id.* at 671.

[39] *Id.* at 675-76.

[40] 389 U.S. 416 (1967) (per curiam).

[41] *Id.* at 417 (Harlan, J., dissenting).

[42] *Id.* at 416-17.

[43] *Id.* at 417. The *Damico* Court quoted *McNeese* for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." *Id.* (quoting McNeese v. Board of Educ., 373 U.S. at 671) (bracketed material supplied by the Court in *Damico*). In *Damico*, the plaintiffs sought injunctive relief and a ruling on the constitutionality of the state statute. 389 U.S. at 416. Since the administrative agency was incompetent to declare a state statute unconstitutional, the administrative remedy was inadequate. The Court did not mention this point in the opinion; nevertheless, it may have been considered *sub silentio*.

[44] *See* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1202-05 (1968) (evaluation of exhaustion requirement after *Monroe*, *McNeese*, and *Damico*).

[45] Preiser v. Rodriguez, 411 U.S. 475 (1973); Gibson v. Berryhill, 411 U.S. 564 (1973). For a discussion of these cases, see notes 47 through 59 and accompanying text *infra*.

[46] *See, e.g.*, Wilwording v. Swenson, 404 U.S. 249, 251-52 (1971) (per curiam) (claims for relief under the Civil Rights Act are not subject to exhaustion requirements); Zwickler v. Koota, 389 U.S. 241, 248 (1967) (plaintiff has a right to pursue federal consti-

In *Preiser v. Rodriguez*,[47] New York inmates alleged that they had been unconstitutionally deprived of good time credits and sought injunctive relief to have the credits restored.[48] At issue was whether the prisoners could bring suit under section 1983 without first exhausting state administrative remedies or whether their sole remedy lay in a writ of habeas corpus.[49] The district court held that the action was properly brought under section 1983 and that exhaustion was, therefore, not required.[50] The court of appeals reversed, concluding that section 1983 could not be utilized where the application to the court was for habeas corpus relief.[51] On rehearing en banc, however, the court of appeals affirmed the district court decision, reasoning that the nature of the action was such that it could be maintained under either section 1983 or the habeas corpus statute.[52] The Supreme Court reversed, holding that the federal habeas corpus statute was the plaintiffs' exclusive remedy,[53] and they could not escape the exhaustion requirement by suing under section 1983.[54]

In *Gibson v. Berryhill*,[55] a case decided the same day as *Preiser*, the Court was presented with a similar question. In *Gibson*, Alabama

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tutional claims in a federal forum).

[47] 411 U.S. 475 (1973).

[48] *Id.* at 476.

[49] *Id.* at 477. The habeas corpus statute, 28 U.S.C. § 2254 (1976) provides in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

[50] Rodriguez v. McGinnis, 307 F. Supp. 627, 632 (N.D.N.Y. 1969).

[51] Rodriguez v. McGinnis, 451 F.2d 730, 733 (2d Cir. 1971).

[52] Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969), *rev'd*, 451 F.2d 730 (2d Cir. 1971), *aff'd on rehearing en banc*, 456 F.2d 79, 80 (2d Cir. 1972), *rev'd sub nom.* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[53] 411 U.S. at 500.

[54] The Court also said that when a prisoner puts forth a constitutional challenge to the conditions of his confinement, § 1983 is an appropriate remedy. *Id.* at 498-500. When the prisoner challenges the fact or duration of his confinement as a means to a more expedient release from prison, however, the exclusive remedy lies under the federal habeas corpus statute. *Id.*

[55] 411 U.S. 564 (1973).

optometrists brought suit seeking injunctive relief from a pending decision of the state licensing board.[56] The plaintiffs claimed that the board was incapable of rendering a fair decision because of internal bias.[57] The Court held that exhaustion was unnecessary since resort to the administrative remedy would not provide adequate relief.[58] Language in the decision indicated that exhaustion might be required in cases where the plaintiff suffers no risk of loss until the administrative proceeding is completed.[59]

More recently, in *Barry v. Barchi*,[60] the Court again declined to limit the availability of section 1983 to plaintiffs who had exhausted state administrative remedies. In this case, the plaintiff was a horse trainer whose horse was shown in a post-race test to have been drugged.[61] The plaintiff's license was suspended without a hearing by the New York State Racing and Wagering Board. Although the plaintiff was allowed an opportunity for a post-suspension hearing,[62] the plaintiff instead filed suit in federal district court alleging that the

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[56] *Id.* at 569.

[57] *Id.* at 570. The Alabama Optometric Association and the Alabama Board of Optometry filed charges against the named optometrists for violating an Alabama statute prohibiting optometrists from practicing if they were not privately employed. *Id.* at 567. The Board charged that the named optometrists had accepted employment with a corporation and were, therefore, no longer privately employed. *Id.* at 568. The named optometrists countercharged that the Board was biased since it was composed entirely of privately employed optometrists who stood to gain financially if the named optometrists' licenses were suspended. *Id.* at 571.

[58] *Id.* at 574-75.

[59] The Court reasoned that:

> Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated. . . . But this Court has expressly held in recent years that state administrative remedies need not be exhausted when the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983 [citations omitted]. Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide. . . .

Id. at 574-75.

[60] 443 U.S. 55 (1979).

[61] *Id.* at 59.

[62] The state regulation permitted the Board to suspend the plaintiff's license until a hearing determined whether or not the license should be reinstated. The regulation did not specify a time limit for conducting the hearing. In addition, the regulation permitted the Board to delay rendering a final decision for up to 30 days after the conclusion of the hearing. *Id.* at 60-61.

state regulation was unconstitutional. Specifically, the plaintiff contended that the regulations deprived him of his right to a hearing before suspension to determine his culpability and that the summary suspension could not be stayed pending review by the Board.[63] The Supreme Court, citing *Gibson*, stated that the plaintiff was not required to exhaust administrative remedies since the available remedy was inadequate.[64]

In determining whether or not the Supreme Court has eliminated the exhaustion requirement, lower courts have reached varying results.[65] Some circuits have taken a narrow view of the high court decisions. For example, in *Eisen v. Eastman*,[66] which involved the constitutionality of the New York rent control law, the Second Circuit held that an action could not be maintained until all available state administrative remedies had been exhausted.[67] Moreover, the court concluded that Supreme Court cases cited for the proposition that exhaustion was not required had been misconstrued;[68] the cases actually stood for the proposition that the requirement should not be applied woodenly.[69] Other circuits have continued to follow the *Monroe v. Pape* line of decisions.[70] Still others have taken a more flexible approach.[71] For

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[63] *Id.* at 61.

[64] *Id.* at 63 n.10, 68.

[65] The cases holding that the Supreme Court decisions do not require exhaustion of state remedies, include, ironically, several Fifth Circuit cases. *See, e.g.*, Chisley v. Richland Parish School Bd., 448 F.2d 1251, 1252 (5th Cir. 1971) (per curiam) (where § 1983 is asserted, exhaustion of state remedies is not required); Hobbs v. Thompson, 448 F.2d 456, 461 (5th Cir. 1971) (same); Burnett v. Short, 441 F.2d 405, 406 (5th Cir. 1971) (plaintiff entitled to a federal forum in a § 1983 suit without regard to whether state remedies were pursued); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 685 (M.D. Ala. 1973) (exhaustion not a prerequisite to § 1983 suit).

[66] 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[67] 421 F.2d at 569.

[68] *Id.* at 568. In reaching this conclusion, the court examined four cases. *McNeese* was distinguished because the *McNeese* plaintiff had no administrative remedy that would afford relief. *Id.* at 569. *Damico* involved an inadequate administrative remedy, and King v. State, 392 U.S. 309 (1968), did not require exhaustion because there was a sufficient constitutional question to require convening a three-judge court. Finally, Houghton v. Shafer, 392 U.S. 639 (1968), involved a futile administrative remedy. 421 F.2d at 569. Thus, the court concluded, since all of these cases involved an exception to the exhaustion requirement, it could not be said that the Supreme Court had abolished exhaustion. *Id.*; *see* notes 34 through 44 and accompanying text *supra*.

[69] 421 F.2d at 569.

[70] *See* note 65 *supra*; Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3d Cir. 1977) (general rule in actions under § 1983 is that state remedies need not be exhausted as a prerequisite to federal jurisdiction); McCray v. Burrell, 516 F.2d 357, 364-65 (4th Cir. 1975) (inmates not required to exhaust administrative remedies under § 1983 before bringing

example, in *Secret v. Brierton*,[72] the Seventh Circuit noted that the Supreme Court had not directly addressed the requirement of exhaustion of state remedies in section 1983 cases, and although the majority of the courts of appeals had interpreted Supreme Court pronouncements as establishing a broad, inflexible rule of non-exhaustion,[73] the Seventh Circuit declined to join the majority.[74]

In the instant case the court reasoned that since important policy considerations favor exhaustion,[75] exhaustion should be required unless the facts of the case constitute an exception to the general requirement.[76] The court analyzed Supreme Court decisions and reasoned that since the Court had been reluctant to establish an iron-clad rule requiring exhaustion,[77] and since the Court indicated that it would permit a flexible approach to the question under appropriate circumstances,[78] exhaustion should be required except in situations clearly ex-

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suit against institution officials for injunctive relief or damages), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976); Hartmann v. Scott, 488 F.2d 1215, 1221 (8th Cir. 1973) (where statutory constitutionality is an issue, exhaustion is not required).

[71] *See, e.g.*, Gonzalez v. Shanker, 533 F.2d 832, 838 (2d Cir. 1976) (exhaustion not required where administrative remedy is inadequate); Palmigiano v. Mullen, 491 F.2d 978, 980 n.4 (1st Cir. 1974) (aggrieved person must pursue administrative process until the case is "ripe" for judicial determination); Elmwood Properties, Inc. v. Conzelman, 418 F.2d 1025, 1027 (7th Cir. 1969) (when exhaustion of remedies will eliminate any possible constitutional problems, that route should be followed), *cert. denied*, 397 U.S. 1063 (1970).

[72] 584 F.2d 823 (7th Cir. 1978). Plaintiff was a prisoner seeking relief for unlawful confiscation of his property. *Id.* at 824-25. The court held that the plaintiff must have exhausted all of his administrative remedies before federal court jurisdiction would lie. *Id.* at 831.

[73] *Id.* at 825-26.

[74] *Id.* at 831.

[75] The considerations listed by the court were:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

634 F.2d at 903 (quoting McKart v. United States, 395 U.S. 185, 195 (1969)).

[76] 634 F.2d at 914; *see* notes 16 through 22 and accompanying text *supra*.

[77] 634 F.2d at 907.

[78] *Id.* at 904-08. The court noted that in City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979), Justices Rehnquist and Blackmun, as well as Chief Justice Burger, indi-

empted by Supreme Court pronouncements.[79] The Fifth Circuit also examined opinions of other courts of appeals and concluded that since several of these courts had taken an analytical approach to the exhaustion requirement, rather than a mechanical approach,[80] and since policy considerations[81] seem to outweigh the objections[82] to an exhaustion requirement, exhaustion should be required in all appropriate[83] section 1983 cases.[84]

The dissents[85] of Judges Rubin, Kravitch and Hatchett agreed

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cated in dissent that the time had come to reexamine *Monroe v. Pape* and the no-exhaustion decisions. 634 F.2d at 907-08.

[79] 634 F.2d at 908.

[80] The court found that the First, Second, Seventh and Ninth Circuits have adhered to a more flexible approach in applying the exhaustion requirement. *Id.* at 909; *see* note 71 and accompanying text *supra.*

[81] The court determined that the policy considerations in favor of a flexible exhaustion requirement were: (1) exhaustion of administrative remedies would promote a wiser allocation of judicial resources by eliminating extraneous issues, sifting through complicated facts, and defining the boundaries of uninterpreted statutes or regulations; (2) exhaustion insures that the action is ripe for adjudication since the agency is given an opportunity to correct any wrongs that may have been committed; (3) exhaustion improves the administrative process itself by giving the agency incentive and a chance to hone its procedures to comply with federal requirements; (4) administrative remedies are generally simpler, easier and less expensive for the parties involved; (5) exhaustion best serves the interests of comity and federalism. 634 F.2d at 911-12.

[82] The objections taken into consideration by the court were: (1) a blanket rule of no-exhaustion would thwart the purposes of § 1983, *see* note 8 *supra*, and (2) given the nature of the rights protected by § 1983, claims under this section should be adjudicated in the federal courts. 634 F.2d at 909-10.

[83] In determining the appropriateness of exhaustion in a particular case, the court set forth some guidelines: (1) an orderly system of review must be provided by statute or written agency rule; (2) the agency must be able to grant relief more or less commensurate with the claim; (3) relief must be available within a reasonable time; (4) procedures must be fair and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims; (5) interim relief must be available to prevent irreparable injury and to preserve the litigant's rights under § 1983 until the administrative process has been concluded. After these factors have been taken into consideration, the court will also need to examine the particular administrative scheme involved, the nature of the interest the plaintiff seeks to protect, and the proper balance of these factors in the particular case. 634 F.2d at 912-13.

[84] The court pointed out that its decision is in no way a limitation upon § 1983 claims. Rather, the decision only prescribes the procedure to follow before bringing a § 1983 action in federal court. *Id.* at 912.

[85] There were three separate dissents: Judge Rubin dissented and was joined by Judges Vance, Frank M. Johnson, Jr., Hatchett, and Sam D. Johnson; Judge Kravitch dissented; and, in the third dissent, Judge Hatchett was joined by Judges Rubin, Vance, Thomas A. Clark, and Frank M. Johnson, Jr. *Id.* at 914-26 (Rubin, Kravitch & Hatchett, JJ., dissenting).

that since the Supreme Court had not required exhaustion of administrative remedies and, in fact, had rejected the requirement without qualification,[86] the majority had misconstrued controlling Supreme Court decisions.[87] Furthermore, Judges Rubin and Hatchett pointed out that since there were important policy and procedural reasons for not requiring exhaustion,[88] lower courts should heed these reasons until the Supreme Court should otherwise decree.[89] Judge Hatchett concluded that since the requirement of exhaustion would thwart one of the congressional purposes of section 1983, which was to provide an independent federal remedy,[90] and since exhaustion could produce a "chilling effect" on civil rights litigation, exhaustion should not be required.[91]

The effect of the decision in *Patsy* is difficult to predict. The Court has implied on several occasions that exhaustion of state administrative remedies is mandatory in certain cases.[92] On the other hand, the Court has been reluctant to apply the exhaustion requirement[93] or to provide guidelines for its application.[94]

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[86] The dissent found that *Damico v. California*, 389 U.S. 416 (1967), had erased any doubts that exhaustion was not required in § 1983 cases. 634 F.2d at 920 (Hatchett, J., dissenting). *See* notes 40 through 44 and accompanying text *supra*.

[87] 634 F.2d at 914, 916 (Rubin, Kravitch & Hatchett, JJ., dissenting).

[88] The reasons articulated in Judge Hatchett's dissent were: (1) the Supreme Court has continually followed the no-exhaustion rule; (2) since Congress has not explicitly required exhaustion in § 1983 cases, as it has in cases under other statutes, Congress does not intend that there be an exhaustion requirement under § 1983; (3) where federal issues are involved, administrative agencies have no expertise; (4) the delay involved in requiring exhaustion may discourage some individuals from seeking vindication of their rights; (5) presumably, the statute of limitations may be tolled while administrative remedies are being exhausted, thereby prohibiting the plaintiff from seeking relief; (6) even where the litigant prevails in a state administrative process, he will need to return to federal court for an award of costs and attorney's fees; (7) class action suits cannot be entertained adequately in most administrative procedures; and (8) regarding comity and federalism, postulated by the majority as a reason for requiring exhaustion, the dissent reasoned that federal/state friction can only increase when federal courts are required to judge the adequacy of state administrative remedies. *Id.* at 924-26 (Hatchett, J., dissenting).

[89] *Id.* at 915, 916, 917 (Rubin & Hatchett, JJ., dissenting).

[90] *Id.* at 919 (Hatchett, J., dissenting).

[91] *Id.* at 916-17 (Hatchett, J., dissenting).

[92] *See* notes 47 through 64 and accompanying text *supra*.

[93] *Id.*

[94] Although the Court has hinted that exhaustion may be required in appropriate cases, it has yet to specifically define "an appropriate case." In *McNeese v. Board of Educ.*, *Gibson v. Berryhill*, and *Barry v. Barchi* the Court qualified its holdings, but in other cases, such as *Damico v. California*, Wilwording v. Swenson, 404 U.S. 249, 251-52

One reason for the Court's reluctance to require exhaustion is found in the purposes underlying section 1983.[95] Congress intended section 1983 to be a federal remedy for infringement of federal rights by the states.[96] This purpose is defeated by the requirement that a plaintiff exhaust his state administrative remedies, because in so doing the state may impede the vindication of the individual's civil rights. The Court, nevertheless, has not abolished the requirement. The probable rationale is two-fold: first, the requirement is firmly established by prior case law,[97] and second, there are some situations in which exhaustion is an appropriate procedural requirement. For example, exhaustion seems appropriate in those cases where an individual is not confronted with a present deprivation of his rights, the administrative remedy is adequate, and the individual will not suffer irreparable harm.[98] Another situation in which exhaustion should be required is when issues of state law are involved, and exhaustion would aid in disentangling state administrative issues from federal issues.[99] Finally, exhaustion should be required when the plaintiff avails himself of section 1983 merely to avoid exhaustion under some other statute.[100]

Concededly, the majority opinion is consistent with the second and third purposes of the Civil Rights Act, to provide a federal remedy where the state remedy is inadequate.[101] The state, however, is not the only party in interest, and there are important policy reasons behind the Court's reluctance to require exhaustion broadly. For example, the delay precipitated by exhaustion of administrative remedies[102] could

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(1971) (per curiam), and Zwickler v. Koota, 389 U.S. 241, 248 (1967), the Court merely stated that exhaustion was not required. *See* notes 43, 46 and text accompanying notes 39, 59 and 64 *supra*. *See also* K. DAVIS, *supra* note 14, at § 20.02.

[95] *See* note 8 *supra*.

[96] *See* Comment, *supra* note 18, at 552-54 (the legislative intent behind § 1983).

[97] *See* note 23 and accompanying text *supra*.

[98] *See* Note, *supra* note 12, at 589 (discussing the few reasons for requiring exhaustion).

[99] *Id.* This should be discretionary with the court. The court may determine that it is capable of separating these issues easily and that agency determinations on these issues do not justify the delay inherent in exhaustion.

Abstention should be the remedy when a state statute or rule of state law is so closely involved that the federal court must defer to the state to decide an unsettled question of state law. Abstention is concerned, however, with exhaustion of judicial remedies. *See generally*, Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967) (discussion of abstention in general).

[100] Note, *supra* note 12, at 589. *See* notes 47 through 54 and accompanying text *supra*.

[101] 634 F.2d at 911.

[102] As the dissent pointed out, administrative procedures are not always simple and

discourage potential litigants from seeking relief. In fact, in *Damico*,[103] exhaustion would have necessitated an intolerable delay for welfare recipients, who depend upon the government for survival.[104] A second policy consideration is that section 1983 actions usually involve at least some issues of federal law which should be resolved by the federal courts rather than by state administrative agencies.[105] In addition, consideration must be given to the strong federal interest in prompt redress of grievances. This interest is especially great where class litigation is involved.[106]

One policy consideration often cited by proponents of exhaustion is the need to prevent the overburdening of federal court dockets.[107] In seeking to limit federal jurisdiction, however, proponents of exhaustion often lose sight of the purpose of section 1983, which is to provide the civil rights litigant with a forum for fair redress of grievances, without regard to the size of the federal court docket.[108]

A no-exhaustion rule would also facilitate greater unformity throughout the judicial system for the protection of federal rights.[109]

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expedient. For example, Georgia Patsy is now required to seek a determination in the state court that the administrative remedy is adequate. She must go through the Florida International University (FIU) career service employee grievance procedure, and if she receives an adverse ruling, she must then apply to the Florida Human Relations Commission (HRC) under procedures outlined in the Florida Administrative Code.

Under the FIU career service employee grievance procedure, Patsy is required to appeal to her superior and other FIU personnel. If the FIU personnel do not follow the appropriate procedural outline, Patsy may then appeal to the Florida Director of Personnel in the Department of Administration. The Director may request that the FIU personnel comply with the procedure, but he lacks authority to enforce this request, so Patsy is remediless if FIU personnel refuse to comply.

Upon an unfavorable ruling by FIU personnel, Patsy may reappeal to the Director, but only if she alleges that the procedural outline was not followed. The Director may then issue a final decision although he lacks authority to enforce it.

If Patsy is not satisfied with the FIU personnel ruling or the decision of the Director, she may then appeal to the HRC. This process not only may be time consuming, but the HRC also lacks enforcement authority. In order to enforce its decision, the HRC must appeal to the state court and then appeal any unfavorable ruling. *Id.* at 924-25 n.7 (Hatchett, J., dissenting).

[103] *See* notes 40 through 44 and accompanying text *supra*.

[104] *See* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 105-06 (discussion of dependency of welfare recipients versus delay in the judicial process).

[105] *See* Comment, *supra* note 44, at 1208.

[106] *See id.* at 1208-09.

[107] *See* Note, *supra* note 13, at 1509.

[108] *See* Comment, *supra* note 18, at 551.

[109] *See* Note, *supra* note 12, at 588. For example, a plaintiff in one state may be

Where determinations are made by many administrative agencies, inconsistencies result.[110] Moreover, federal judges are not as prone to compromise an individual's civil rights when they conflict with a state statute or administrative regulation.[111] Finally, since administrative determinations technically do not have a res judicata effect,[112] and the federal court has original jurisdiction over section 1983 claims,[113] the federal court is in no way bound by administrative findings, even if the determinations are correct.[114] Therefore, exhaustion, even in appropriate cases, at best may have the effect of merely postponing judicial relief.[115] At worst, a biased finder of fact at the administrative level may negate a bona fide claim, since a trial de novo may not always be granted after a factual determination has been made by an administrative agency.

The dissenting Justices' conclusion that the *Patsy* majority has misconstrued Supreme Court decisions is not without merit. For example, the majority points out that in *McNeese*, exhaustion was not required because the administrative remedy was inadequate; therefore, the case fell into an exception to exhaustion.[116] While this conclusion is true, the majority ignores the fact that their decision is inconsistent with *McNeese* since *McNeese* requires the state to prove the adequacy of administrative remedies; if any defect exists, then exhaustion is not required.[117] The administrative remedy which the Fifth Circuit now requires Patsy to exhaust contains the same defects as the remedy found inadequate in *McNeese*.[118] Furthermore, the majority ignores the

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asserting the same claim as a plaintiff in another state, but one may be granted judicial relief because the particular administrative remedy is inadequate or falls under one of the other exceptions, while the second plaintiff is denied relief. Even if both remedies were adequate, different results might be reached by the agencies. This hypothetical problem is limited, of course, to situations in which the factual determinations are not confined to the particular plaintiff.

[110] *Id.*

[111] *Id.*

[112] *See* note 18 *supra.*

[113] *See* note 1 *supra.*

[114] Technically this is true. Usually, however, when a federal administrative agency makes the determination, it is upheld by the court if it is "reasonable," even if the court would have reached a different decision on judgment de novo. Comment, *supra* note 18, at 552.

[115] *Id.* at 551.

[116] *See* note 39 and accompanying text *supra.*

[117] 373 U.S. at 674-76.

[118] *See* note 102 *supra. McNeese* held inadequate an administrative remedy in which the official, at the conclusion of the administrative proceedings, was unable to grant relief, thus requiring the complainant to petition the state court for relief. 373 U.S.

Preiser decision in which the Court clearly states that exhaustion is not required in section 1983 cases.[119]

The majority also ignores the recent Congressional enactment of an exhaustion requirement directed toward a limited category of section 1983 cases.[120] The imposition of a broad exhaustion requirement in the face of this enactment has the effect of usurping a policy role which belongs solely to Congress.[121]

Section 1983 was intended to be an independent federal remedy for civil rights litigants, and section 1983 exhaustion is more of a comity and federalism principle than a jurisdictional requirement.[122] The imposition of a broad exhaustion requirement places unnecessary procedural hurdles in the path of the civil rights litigant. Although there are instances in which exhaustion is appropriate,[123] a general rule of exhaustion requires the litigant to exhaust his administrative remedies or forego a judicial remedy. This is the dilemma which Patsy now faces.[124] A more appropriate remedy would have been to allow Patsy to sue in federal court without the necessity of exhausting her administrative remedies. Instead, if the case did not fall within an exception, the majority decision not only required Patsy to exhaust these remedies, but also established guidelines for exhaustion, which the Supreme Court has been hesitant to do.[125] While an affirmance by the Supreme Court would serve to clear some of the confusion surrounding exhaustion in section 1983 cases,[126] the effect of such a decision on the civil rights litigant could be devastating.

H. Camilla Emanuel

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at 675.

[119] *See* notes 50 through 54 and accompanying text *supra*.

[120] *See* 42 U.S.C. § 1997e (Supp. 1980) (Civil Rights of Institutionalized Persons Act requires exhaustion of administrative remedies in all § 1983 actions brought by adult convicted of crime confined to any jail, prison, or other correctional facility).

[121] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 269 (1975) (the judicial imposition of a broad exhaustion requirement for § 1983 cases usurps "the policy role that Congress has reserved for itself").

[122] 634 F.2d at 923-24 (Hatchett, J., dissenting).

[123] *See* notes 98 through 100 and accompanying text *supra*.

[124] *See* note 102 *supra*.

[125] *See* notes 34 through 64 and accompanying text *supra*.

[126] Not only has the Supreme Court's treatment of exhaustion in § 1983 cases been confusing, but various authors have attempted to second guess the Court and have suggested guidelines for determining when exhaustion should be required. *E.g.*, Comment, *supra* note 44, at 1208-09; Comment, *supra* note 18, at 554-55; Note, *supra* note 13, at 1507-08.

TORTS—NEGLIGENCE—THE SUDDEN EMERGENCY DOCTRINE IS ABOLISHED IN MISSISSIPPI

Plaintiff, a passenger in defendant's vehicle, brought an action to recover damages for injuries sustained in a motor vehicle accident which was allegedly the result of defendant's negligence.[1] In the face of sharply conflicting testimony regarding the circumstances surrounding the accident,[2] the defendant was granted a sudden emergency instruction.[3] A jury trial in the Circuit Court of Jackson County resulted in a

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[1] Knapp v. Stanford, 392 So. 2d 196, 196 (Miss. 1980). The accident occurred December 31, 1977 on U.S. Highway 90 near Pascagoula, Mississippi. The plaintiff, Robert Knapp, was seated on the rear seat of a "Blazer" owned and operated by the defendant, James B. Stanford. *Id.*

[2] Defendant testified he was driving on the proper side of the road at a reasonable speed when an oncoming vehicle moved into his lane of traffic, forcing him to move off the road and down onto the right shoulder. *Id.* at 197. The right wheels of his car remained on the shoulder, which was very uneven and bumpy, for two to four seconds. When he attempted to steer his car back onto the road, the tires caught on the edge of the pavement, which was, in places, six to eight inches higher than the shoulder, and his car went into a spin and flipped over. *Id.* at 200-01 (Walker, J., dissenting).

Plaintiff testified the vehicle was being operated at a high rate of speed; the defendant told him a few seconds before the accident occurred that they were traveling approximately 90 to 95 miles per hour. Furthermore, he did not see another vehicle on the roadway. *Id.* at 197.

[3] *Id.* at 197. The lower court's instruction read as follows:

> The court instructs the jury that under the law when a person is confronted with a sudden emergency not of his own making and is by reason thereof placed in a position of peril to himself without sufficient time in which to determine with certainty the best thing to do, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and in this case if you believe from a preponderance of the evidence, that James B. Stanford, immediately prior to the accident in question, was driving his vehicle on his right side of the road, at a reasonable rate of speed and he was suddenly, without warning, confronted with the vehicle driven by persons unknown within James Stanford's lane of traffic and that the presence of the other vehicle constituted a sudden emergency which was not of a making of the defendant, James B. Stanford, and if you further find from a preponderance of the evidence that after having been confronted with such sudden emergency, if any, the defendant, James B. Stanford, used the same degree of care that a reasonably prudent automobile driver would have used under the same or similar unusual circumstances, if any, but was unable to avoid the accident giving rise to this lawsuit, then the defendant, James B. Stanford, was not guilty of negligence which proximately caused the collision in question, and in that event, it would be your sworn duty to return a verdict for the defendant, James B. Stanford.

verdict for the defendant. Plaintiff appealed, assigning several errors, including the lower court's granting of the sudden emergency instruction.[4] On appeal, the Mississippi Supreme Court *held*, reversed. The doctrine of sudden emergency is abolished in Mississippi, and the use of the words "sudden emergency" in jury instructions is hereafter prohibited. *Knapp v. Stanford*, 392 So. 2d 196 (Miss. 1980).

The sudden emergency doctrine[5] is a nonstatutory principle under which the law recognizes that a person suddenly and unexpectedly placed in a position of impending peril usually will not, and should not be expected to, exercise the judgment and discretion of a person acting under normal circumstances.[6] Because of its common sense approach, the doctrine is applicable to a variety of emergency situations.[7] However, the most common use of the rule has been in the context of injury claims resulting from motor vehicle accidents.[8]

The doctrine originated in England, where the 1816 decision in *Jones v. Boyce*[9] first set forth its elements as they are known today. Less than twenty-five years later, the United States Supreme Court, in *Stokes v. Saltonstall*,[10] endorsed an instruction[11] based on *Jones* and thus brought the sudden emergency doctrine into prominence in this country. Each decision involved an action against an owner or operator

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Id. (quoting the lower court's instruction).

[4] *Id.* at 196. The court held that only one of the assigned errors, the granting of the sudden emergency instruction, had merit, and restricted its opinion to that issue alone. *Id.*

[5] The sudden emergency doctrine is known by a variety of names: the doctrine of sudden peril, Hormovitis v. Mutual Lumber Co., 120 So. 2d 42, 45 (Fla. Dist. Ct. App. 1960); the sudden danger doctrine, Reese v. Buhle, 16 Ill. App. 2d 13, 147 N.E.2d 431, 435 (1957); the doctrine of imminent peril, Dreyfus v. Mississippi City Lines, Inc. 261 So. 2d 786, 789 (Miss. 1972); and the emergency rule, Hoehne v. Mittelstadt, 252 Wis. 170, 31 N.W.2d 150, 152 (1947).

[6] *See* Peel v. Gulf Transp. Co., 252 Miss. 797, 815-16, 174 So. 2d 377, 385 (1965) (definition of the sudden emergency doctrine); Comment, *The Sudden Emergency Doctrine*, 36 MISS. L.J. 392, 392 (1965) (same).

[7] *E.g.*, United States v. Jasper, 222 F.2d 632, 633 (4th Cir. 1955) (military policeman threatened by angry mob not negligent in firing pistol); Elmore v. Des Moines City Ry., 207 Iowa 862, 224 N.W. 28, 29, 31 (1929) (plaintiff dragged while holding bumper of defendant's bus not contributorily negligent); Barnhardt v. American Glycerine Co., 113 Kan. 136, 213 P. 663, 665 (1923) (driver abandoning burning car loaded with nitroglycerine without first securing the brakes not negligent).

[8] *See* Note, *The Sudden Emergency Doctrine in Florida*, 21 U. FLA. L. REV. 667, 667 (1969).

[9] 171 Eng. Rep. 540 (N.P. 1816). *See generally* Comment, *supra* note 6, at 393-95 (discussing the history of the sudden emergency doctrine).

[10] 38 U.S. (13 Pet.) 181 (1839).

[11] *Id.* at 191.

of a coach for injuries received when the plaintiff was forced to jump from the coach to avoid injury due to the defendant's reckless and negligent operation of the coach. In each instance, the plaintiff successfully utilized the doctrine to avoid a charge of contributory negligence.[12] It was to this end that the doctrine was most often employed in its early history.[13] Today, however, the sudden emergency doctrine is frequently invoked by a defendant to counter a charge of primary negligence. This has been true in an overwhelming majority of Mississippi cases reported during the past twenty-five years.[14]

While many of the early cases applying the doctrine emphasized the necessity of excusing an actor's "instinctive" reaction to an emergency situation,[15] today's courts no longer require the reference to instinct,[16] emphasizing instead that the actor is placed in a situation in which the normal options of reasonable conduct are unavailable.[17] The doctrine applies even though in retrospect it becomes clear that the actor's decision was wrong, and was in fact one which no reasonable person, given ample time for reflection, would have considered.[18]

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[12] *Id.*; 171 Eng. Rep. at 540.

[13] *See* Comment, *supra* note 6, at 394 (use of sudden emergency doctrine important because contributory negligence of plaintiff would bar recovery).

[14] A survey of 40 cases appealed to the Mississippi Supreme Court since 1955 involving some aspect of the sudden emergency doctrine revealed that a plaintiff sought to invoke the doctrine in only six cases: Gates Rubber Co. v. Duke, 367 So. 2d 910, 912-13 (Miss. 1979); Hill v. Acord, 259 So. 2d 472, 473 (Miss. 1972); Acord v. Moore, 243 So. 2d 55, 58 (Miss. 1971); Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 663, 182 So. 2d 228, 230 (1966); Gulf, M. & O. R.R. v. Withers, 247 Miss. 123, 131-33, 154 So. 2d 157, 159 (1963); Majure v. Herrington, 243 Miss. 692, 699-700, 139 So. 2d 635, 638 (1962). On a national basis, this imbalance does not exist. One reason for this difference may be that in some states, contributory negligence is a complete bar to the plaintiff's recovery, while the Mississippi comparative negligence statute allows apportionment of damages. Comment, *supra* note 6, at 394-95.

[15] *E.g.*, Whicher v. Phinney, 124 F.2d 929, 931 (1st Cir. 1942) (where defendant had only two seconds to avoid person in road, defendant's instinctive action did not render him negligent).

[16] *See* Evans, *The Standard of Care in Emergencies*, 31 Ky. L.J. 207, 217-18 (1943) (change from instinctiveness requirement marks development in law of sudden emergency); Note, *supra* note 8, at 667-68 (reference to impulse or instinct is unnecessary to justify court's use of the emergency doctrine).

[17] Majure v. Herrington, 243 Miss. 692, 699, 139 So. 2d 635, 638 (1962) (quoting 60 C.J.S. *Motor Vehicles* § 257(a)(1969)); *see* W. Prosser, Handbook of the Law of Torts § 33, at 169 (4th ed. 1971) (excited actor must make a speedy decision based largely upon impulse).

[18] Restatement (Second) of Torts § 296, Comment b, at 64-65 (1965); *see* Kane v. Worcester Consol. St. Ry., 182 Mass. 201, 65 N.E. 54, 54 (1902) (action may be mistaken and yet prudent).

Although the sudden emergency doctrine makes allowances for the imperfections of human behavior, it is subject to significant limitations which serve to restrict its general application. Of paramount importance is the fact that the doctrine does not provide for a different standard of care in an emergency than in any other situation.[19] In order to avoid negligence in any circumstance, the actor must conduct himself as would a reasonable and prudent person under the same or similar circumstances,[20] and he may still be found negligent, despite the emergency, if his actions are deemed to be unreasonable.[21] By way of further limitation, most states have promulgated rules which set forth conditions that must be met before an actor is entitled to a jury instruction based on the sudden emergency doctrine. The following conditions are a representative sample:[22] there must have been an actual or apparent emergency;[23] the emergency must not have been reasonably anticipated;[24] the actor must have been aware of the emergency;[25] it must not have been created by his own negligent or wrongful conduct;[26] he must have had alternative courses of action from which to

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[19] Dean v. Travelers Ins. Co., 171 So. 2d 708, 709 (Ct. App. La. 1965) (sudden emergency language does not modify the standard tests of negligence); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 42, 50 So. 2d 902, 905 (1951) (emergency doctrine is not an exception to the general rule requiring reasonable care).

[20] Dean v. Travelers Ins. Co., 171 So. 2d 708, 708-09 (Ct. App. La. 1965) (reference to sudden emergency merely serves to emphasize "under the circumstances"); Zillmer v. Miglautsch, 35 Wis. 2d 691, 151 N.W. 2d 741, 748 (1967) (reasonable and prudent person test is applicable before, during, and after the emergency).

[21] W. PROSSER, *supra* note 17, at 169; *see, e.g.*, Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 13, 108 So. 2d 409, 414 (1959) (whether driver's actions after vehicle's brake failure were reasonable is a jury question).

[22] The individual elements of the sudden emergency doctrine are discussed in Wise, *The Sudden Emergency Doctrine As Applied in South Carolina*, 20 S.C.L. REV. 408, 409-15 (1968) and Comment, *supra* note 6, at 393, 396-404.

[23] *See, e.g.*, Squires v. McLaughlin, 44 Wash. 2d 43, 265 P.2d 265, 268-69 (1953) (lunging for bottle of vodka on car seat does not constitute a sudden emergency).

[24] W. PROSSER, *supra* note 17, at 170 (some emergencies must be anticipated, and when actor engages in an activity in which they are likely to occur, he must be prepared to meet them); *see, e.g.*, Potts v. Krey, 362 S.W.2d 726, 727 (Ky. 1962) (failure to anticipate child darting into vehicle's path); May v. Pace, 197 So. 2d 220, 222 (Miss. 1967) (failure to anticipate sudden stop of car).

[25] *See, e.g.*, Hanson v. Matas, 212 Wis. 275, 249 N.W. 505, 506 (1933) (deaf man who turned toward truck which then hit him from behind acted without being aware that he was in an emergency).

[26] *See, e.g.*, Mercier v. Davis, 234 So. 2d 902, 904 (Miss. 1970) (sudden emergency instruction unavailable because driver following too closely); Ladner v. Merchants Bank & Trust Co., 251 Miss. 804, 815-17, 171 So. 2d 503, 508-09 (1965) (unavailable because of driver's excessive speed).

choose;[27] and he must have been required to act instantly, without time for reflection or the exercise of discretion.[28] Ideally, these conditions, coupled with the requirement of reasonableness under the circumstances, operate as a check against indiscriminate use of the doctrine.

The lower courts in Mississippi applying the sudden emergency doctrine have experienced confusion in two areas. First, the courts have encountered difficulty in determining when the circumstances of a case justify application of the doctrine.[29] In the case of *Vann v. Tankersly*,[30] the sudden emergency doctrine was first applied in a Mississippi negligence case. The defendant in *Vann*, while attempting to prevent his wife from falling out of the right side of his car, lost control of the automobile and injured a bystander.[31] In reversing a jury verdict finding the defendant guilty of negligence, the court held that his actions in light of the extraordinary situation were understandable, and since he did not contribute to the emergency, his conduct was not neg-

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[27] *See, e.g.*, Frangos v. Edmunds, 179 Or. 577, 173 P.2d 596, 610 (1946) (driver was refused sudden emergency instruction because only alternative was to apply brakes).

[28] Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 45, 50 So. 2d 902, 906 (1951) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 242-43 (1941)).

[29] Mississippi Supreme Court cases considering the appropriateness of lower court applications of the sudden emergency doctrine can be conveniently grouped as follows: (1) cases in which the instruction was improperly granted because the wrongful conduct of the party seeking to invoke the rule proximately caused or contributed to the emergency, *see, e.g.*, Wood v. Walley, 352 So. 2d 1083, 1086-87 (Miss. 1977) (following too closely); Peavy v. Alexander, 308 So. 2d 65, 68 (Miss. 1975) (excessive speed); Bozeman v. Tucker, 203 So. 2d 795, 797 (Miss. 1967) (failure to slow down to avoid cows in road); (2) cases in which the instruction was improperly granted because the party either had reason to expect the emergency situation or had sufficient opportunity once the emergency arose for the exercise of judgment and discretion, *see, e.g.*, Gates Rubber Co. v. Duke, 367 So. 2d 910, 912 (Miss. 1979) (products liability suit); Nielson v. Miller, 259 So. 2d 702, 704 (Miss. 1972) (driver could have applied emergency brake when regular brakes failed); Pullin v. Nabors, 240 Miss. 864, 873-74, 128 So. 2d 117, 120-21 (1961) (flashing light provided sufficient warning); (3) cases in which the court found the lower court to have correctly granted or denied a sudden emergency instruction in view of the facts surrounding the accident, *see, e.g.*, Graves v. Hart's Bakery, Inc., 241 So. 2d 673, 674-75 (Miss. 1970) (car weaving across road); Young v. Schwarz, 230 So. 2d 583, 585 (Miss. 1970) (children running into street); Young v. Cameron, 203 So. 2d 315, 316 (Miss. 1967) (car crossing road in front of driver).

[30] 164 Miss. 748, 145 So. 642 (1933). For cases leading up to the court's holding in *Vann*, see Rhodes v. Fullilove, 161 Miss. 41, 49, 134 So. 840, 843 (1931) (wisdom of plaintiff's actions is not to be judged in retrospect, but under circumstances existing at the time); Mississippi Power & Light Co. v. Sumner Gin Co., 156 Miss. 830, 840, 127 So. 284, 286 (1930) (question of negligence must be considered in light of what an ordinary and prudent man would do or fail to do in similar circumstances).

[31] 164 Miss. at 752-53, 145 So. at 643.

ligent.[32] In later cases, the Mississippi Supreme Court considered further the question raised in *Vann* of whether an emergency sufficient to invoke the doctrine of sudden emergency actually existed.[33] Other conditions for a proper sudden emergency situation in Mississippi were developed in decisions rendered subsequent to *Vann*[34] and track very closely those found in the majority of other states.[35]

The second area of confusion results from the failure of judges to determine when a sudden emergency instruction inaccurately or inadequately states the applicable law.[36] In *Gulf, Mobile & Ohio Railroad v. Withers*,[37] the court set forth three essential elements which must be

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[32] *Id.* at 756-59, 145 So. at 644-45.

[33] *See, e.g.*, Saucier v. Talkington, 251 Miss. 519, 527-28, 170 So. 2d 434, 437 (1965) (child darting across street); Majure v. Herrington, 243 Miss. 692, 700, 139 So. 2d 635, 639 (1962) (car coming over crest of hill in wrong lane); Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 13-14, 108 So. 2d 409, 414 (1959) (brake failure).

[34] The requirements a party had to meet before a Mississippi court could grant a motion for a sudden emergency instruction were summarized in Wood v. Walley, 352 So. 2d 1083 (Miss. 1977):

> (1) The motorist seeking the instruction must be driving in a reasonable and prudent manner; (2) the driver must be suddenly confronted with an unexpected and sudden emergency; (3) the emergency cannot be created or contributed to by the negligence or the wrongful conduct of the driver claiming the benefit of the rule; (4) the driver must be placed in a position of peril to himself; (5) the driver cannot have sufficient time in which to determine by rational deliberation the best alternative; (6) and the degree of care to be weighed by the jury under the said emergency doctrine is that which a reasonably prudent and capable driver would use under the "unusual" circumstances brought about by the sudden emergency.

Id. at 1086-87. *See* Peel v. Gulf Transp. Co., 252 Miss. 797, 813-16, 174 So. 2d 377, 384-85 (1965) (driver must not have been negligent and must not have had time for rational deliberation of alternatives); Majure v. Herrington, 243 Miss. 692, 699, 139 So. 2d 635, 638 (1962) (driver must be proceeding in reasonable manner when confronted with unexpected emergency); Moore v. Taggart, 223 Miss. 389, 402, 102 So. 2d 333, 337 (1958) (degree of care is that which would be exercised by reasonable and prudent driver).

[35] *See* notes 22 through 28 and accompanying text *supra*.

[36] *See, e.g.*, Dreyfus v. Mississippi City Lines, Inc., 261 So. 2d 786, 789 (Miss. 1972) (definition of emergency not tied to facts of case); Acord v. Moore, 243 So. 2d 55, 58 (Miss. 1971) (essential elements omitted); Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 666, 182 So. 2d 228, 232 (1966) (same). The Mississippi Supreme Court affirmed lower court decisions on the form of the sudden emergency instruction in Hill v. Acord, 259 So. 2d 472, 475 (Miss. 1972) (erroneous instruction properly denied); Saucier v. Talkington, 251 Miss. 519, 527-28, 170 So. 2d 434, 437 (1965) (erroneous form of instruction held harmless error); Phillips v. Dow Chem. Co., 247 Miss. 293, 304-05, 151 So. 2d 199, 203 (1963) (instruction appropriate even though sudden emergency not specifically pleaded); Rushing v. Edwards, 244 Miss. 677, 683-84, 145 So. 2d 695, 697-98 (1962) (ambiguous sudden emergency instruction sufficiently clarified by other instructions).

[37] 247 Miss. 123, 154 So. 2d 157 (1963).

incorporated into such an instruction. First, the instruction must point out that the party invoking the doctrine used reasonable care before the emergency arose, and that the emergency was not one of his own creation. Second, the instruction must define and briefly describe the sudden emergency and must state the facts that would permit the jury to determine whether a sudden emergency actually existed. Finally, the jury should be instructed that, after the emergency arose, the actor must have exercised such care as a reasonably prudent and careful person (or capable driver) would use under the circumstances.[38]

Despite the guidance offered by *Withers* in the formulation of sudden emergency instructions, in subsequent years the Mississippi Supreme Court was forced to reverse a number of lower court decisions because of the failure of the granted instruction to state correctly one or more of the essential elements.[39] This continued difficulty experienced by the lower courts led the court to question, at times, the necessity of granting the instruction at all.[40] In this respect, the Mississippi court joined a number of other courts[41] and legal commentators[42] in voicing dissatisfaction with a separate charge to the jury on the sudden emergency issue. This dissident group contends that ordinary rules of negligence adequately provide for the emergency situation and that a separate instruction on this point is unnecessary and tends to con-

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[38] *Id.* at 132-33, 154 So. 2d at 160.

[39] *See* note 36 *supra*.

[40] *See, e.g.*, Young v. Schwarz, 230 So. 2d 583, 585 (Miss. 1970) (questioned whether sudden emergency instruction was ever properly given, but continued adherence to the doctrine).

[41] For example, in Finley v. Wiley, 103 N.J. Super. 95, 246 A.2d 715 (1968), the court stated:

> [W]e entertain grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile accident case.
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> . . . The ordinary rules of negligence were applicable and afforded a sufficient gauge by which to appraise his [defendant's] conduct . . . . The giving of the additional charge tended to be argumentative in its effect and served to unduly emphasize one phase of the proofs. We are satisfied that it played a significant part in the jury's finding of no negligence, and in the denial of justice which resulted.

246 A.2d at 719. Additional cases are cited at note 43 *infra*.

[42] *See, e.g.*, Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30, 43 & n.42 (1963) (current appellate court reports reflect the courts' struggle with negative aspects of the negligence issue); Reynolds, *Put Yourself in an Emergency—How Will You Be Judged?*, 62 KY. L.J. 366, 375 (1974) (no reason for departing from general custom of instructing jury to consider all circumstances and to determine reasonableness of actor's conduct in light of such facts); Thode, *Imminent Peril and Emergency in Texas*, 40 TEX. L. REV. 441, 446 (1962) (no logical or legal justification for "emergency issues"; submitting issue to jury in this form leads to many difficulties).

fuse jurors on the real issue of negligence before them.[43] Comments to the model or pattern jury instructions in at least four states, Illinois,[44] Florida,[45] Kansas,[46] and Missouri,[47] now recommend that no sudden

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[43] *See* Massotto v. Public Serv. Coordinated Transp., 71 N.J. Super. 39, 176 A.2d 280, 285-86 (Super. Ct. App. Div. 1961) (modern view is that separate charge on sudden emergency is unnecessary, confusing, and should be eliminated); Wietzel v. Wingard, 274 Or. 185, 546 P.2d 121, 135 (1976) (Tongue, J., dissenting) (vice of emergency instruction is that it gives a party a "double shot" on the issue of whether conduct was sufficient to satisfy duty to exercise reasonable care); Ballard v. Rickabaugh Orchards, Inc., 259 Or. 200, 485 P.2d 1080, 1083 (1971) (emergency instruction is unnecessary and should be avoided); Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378, 383 (1961) (in view of potential problem of overemphasis, trial court should consider refusing to give sudden emergency instruction since regular instructions on negligence usually cover area sufficiently); Comment, *Justice v. Harrison: The Emergency Doctrine*, 3 OKLA. CITY U.L. REV. 723, 731 (1979) (emergency doctrine is often inappropriately used and tends to confuse juries and focus attention away from real issues). *See also* RESTATEMENT (SECOND) OF TORTS § 283, Comment c at 12-13 (1965) (traditional reasonable man standard provides sufficient flexibility to permit full consideration of all the circumstances of the case which may affect the required conduct).

The tendency of the sudden emergency instruction to obscure the concept of proximate cause when a jury seeks to resolve the question of an actor's liability is discussed in Ellwood v. Peters, 182 So. 2d 281, 285-86 (Fla. Dist. Ct. App. 1966), and Kline v. Emmele, 204 Kan. 629, 465 P.2d 970, 972-73 (1970). The court in *Kline* pointed out that even where there is definite evidence of negligence on the part of a defendant, the weight of such evidence might well be destroyed by a sudden emergency instruction because the jury might lose sight of, or disregard, the negligence which caused the emergency. 465 P.2d at 973.

[44] ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS — CIVIL 12.2 (2d ed. 1971). Three reasons were listed for the recommendation: "First, it is argumentative. Second, it states a simple and obvious fact about human behavior. Third, except in the most obvious case when no juror would need to be reminded of the proposition it will probably lead to reversible error." *Id.* For a case in which an Illinois appellate court relied on this recommendation, see Keel v. Compton, 120 Ill. App. 2d 248, 256 N.E.2d 848, 853 (App. Ct. 1970) (trial court erred in giving sudden emergency instruction).

[45] SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS, FLORIDA STANDARD JURY INSTRUCTIONS 4.8 (1974). The section states that: "The Committee recommends that no charge be given on the subject of sudden emergency. In the circumstances of an emergency, as in 'ordinary circumstances,' the applicable standard of care is reasonable care under the circumstances." For a discussion of the significance and impact of this recommendation, see Note, *supra* note 8, at 679-80.

[46] COMMITTEE ON PATTERN JURY INSTRUCTIONS KANSAS DISTRICT JUDGES' ASSOCIATION, PATTERN INSTRUCTIONS FOR KANSAS 8.81 (Supp. 1975). The comment to this section notes that the recommendation is based on the Kansas Supreme Court's criticism of the sudden emergency doctrine in Mesecher v. Cropp, 213 Kan. 695, 518 P.2d 504, 511 (1974), Kline v. Emmele, 204 Kan. 629, 465 P.2d 970, 972 (1970), and Lawrence v. Deemy, 204 Kan. 299, 461 P.2d 770, 774 (1969). It concludes by stating: "The Committee believes there is no valid justification for the continued giving of the instruction. The

emergency instruction be given. However, despite the growing discontent with the sudden emergency instruction and its impact on the unbiased disposition of personal injury claims in negligence cases, no other state court has abolished the doctrine entirely.[48]

In the instant case, the court found that since the sudden emergency allegedly arose because of the errant path of an approaching vehicle,[49] the emergency ended when the appellee successfully avoided that vehicle,[50] and he was no longer excused for his failure to determine the most reasonable method of returning to the roadway.[51] Thus, since the ensuing accident did not result from the sudden emergency, but from appellee's subsequent unreasonable actions,[52] the instruction which he requested on this point was inappropriate, and the action of the trial court in granting the instruction was reversible error.[53] In the second part of the opinion, the court reasoned that since the sudden emergency doctrine often served to confuse the operation of Mississippi's comparative negligence statute,[54] and, further, was often interpreted as requiring an inordinately high standard of proof for a finding of negligence,[55] a wiser policy would be to apply general rules of negli-

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emergency circumstances are a proper matter for argument by counsel." PATTERN INSTRUCTIONS FOR KANSAS, *supra*, 8.81.

[47] MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS 1.04 (2d ed. 1969). Three reasons were listed for the recommendation: (1) the language is argumentative; (2) the jury has already been instructed that the standard of care is measured by what would be done by others similarly situated; (3) the instruction may cause reversible error when submitted to cover antecedent negligence not in issue." *Id.*

[48] *See* note 63 *infra*. *See generally* Annot., 80 A.L.R.2d 5 (1961) (review of state court decisions on sudden emergency instructions in automobile cases).

[49] Knapp v. Stanford, 392 So. 2d 196, 197 (Miss. 1980). In considering the validity of the granted instruction, the court assumed that the defendant's testimony, *see* note 2 *supra*, was truthful. *Id.* at 197.

[50] *Id.* at 198. Although the distance the vehicle traveled while partially off the road was disputed, the court concluded it was "clear" the sudden emergency was over and that either the manner in which the driver steered the vehicle back onto the road, the vehicle's speed, or the interaction of the wheels and the raised road surface was the sole cause of the accident. *Id.* at 197-98.

[51] *Id.* at 198.

[52] *See* notes 50, 51 and accompanying text *supra*.

[53] 392 So. 2d at 198.

[54] *Id.*; *see, e.g.*, Peel v. Gulf Transp. Co., 252 Miss. 797, 816-17, 174 So. 2d 377, 386 (1965) (instruction raised erroneous inference as to defendant's potential negligence); Rivers v. Turner, 223 Miss. 673, 680, 78 So. 2d 903, 906 (1955) (instruction which failed to take comparative negligence statute into account was misleading and erroneous).

[55] 392 So. 2d at 198.

gence to all situations.[56] The court concluded by asserting its belief that, since negligence cases could be most efficiently handled by applying uniform principles of negligence in all circumstances,[57] the sudden emergency instruction should be discarded, allowing the jury to consider only what a reasonable and prudent person would have done under the circumstances.[58]

In a strongly worded dissent, Justice Walker, joined by three other justices,[59] argued that since the appellee had been forced from the roadway through no fault of his own, and since he remained in a dangerous and difficult position during the entire time that he was off the road, the entire sequence of events, and not just the initial encounter with the approaching vehicle, constituted the sudden emergency,[60] and this fact justified the granting of a proper[61] sudden emergency instruction.[62] Justice Walker reasoned further that since the Mississippi Supreme Court had developed relatively clear cut and easy to follow rules

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[56] *Id.* at 199; *see* notes 41 through 43 *supra.*

[57] 392 So. 2d at 199.

[58] *Id.*

[59] Justices Smith, Robertson, and Cofer joined in the dissent. *Id.* at 202 (Walker, J., dissenting). In addition, Justice Smith filed a separate dissent in which he objected to the declaratory and anticipatory nature of the majority's action in rendering a decision abolishing a doctrine while simultaneously claiming that the doctrine in no way controlled the instant case. *Id.* at 199-200 (Smith, J., dissenting).

[60] *Id.* at 200-01 (Walker, J., dissenting). The dissent emphasized the defendant's description of the difficulties he faced after being forced off the road by the approaching vehicle. This testimony, according to the dissent, established that the sudden emergency was not over. *Id.* "At the very least the evidence presented a classic question for the jury." *Id.* at 200; *see, e.g.,* Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 665, 182 So. 2d 228, 231 (1966) (when there exists a question of fact, the issue of sudden emergency is properly submitted to the jury); Lum v. Jackson Indus. Uniform Serv., Inc., 253 Miss. 342, 348-50, 175 So. 2d 501, 503-04 (1965) (unless negligence of defendant is established as a matter of law, then question of sudden emergency is for jury to decide); Rushing v. Edwards, 244 Miss. 677, 684, 145 So. 2d 695, 698 (1962) (question of whether sudden emergency was created through negligence of defendant was issue of fact for jury).

[61] Although Justice Walker found that a sudden emergency instruction should have been granted, he concluded that the lower court's wording of the instruction was erroneous because it was not sufficiently tied to the evidence and, thus, did not provide a proper guideline for the jury to use in making its decision. Accordingly, Justice Walker voted to reverse the lower court decision. 392 So. 2d at 202; *see* Dreyfus v. Mississippi City Lines, 261 So. 2d 786, 789 (Miss. 1972) (instruction which gave the legal definition of sudden emergency but which did not relate it to facts shown by testimony held erroneous); MISSISSIPPI CIRCUIT COURT JUDGES' ASSOCIATION & MISSISSIPPI JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS 36.11 (1977) (sudden emergency instruction should "state facts constituting the alleged sudden emergency").

[62] 392 So. 2d at 201.

on the sudden emergency question,[63] and since the test that the majority imposed for future use was essentially the same as that used in the past, then the majority's abrogation of the doctrine was unwarranted and, further, would result in more confusion than the doctrine itself.[64]

In light of the court's increasing dissatisfaction with the operation and application of the sudden emergency doctrine, dramatically illustrated by the high rate of reversal of sudden emergency cases brought on appeal,[65] the court's action in abolishing the doctrine was not completely unexpected. However, considering the sharply conflicting testimony concerning the circumstances of the accident,[66] the majority's action in determining that the sudden emergency had ended, without resorting to the usual procedure of allowing the jury to determine this factual issue, appears to disregard procedures established in the court's previous decisions. It is well established in Mississippi that questions concerning the existence of an actual emergency should be submitted to the jury.[67] Given this requirement, it would seem to follow *a fortiori* that, where the testimony has raised a jury question regarding the existence of an emergency,[68] the question of the duration of the emergency should also properly be for the jury.

The second part of the decision, in which the court prohibited the future application of the doctrine, is the more significant. It will undoubtedly be well received by future plaintiffs and regarded with disfavor by future defendants.[69] Although the test that the court provided for future use[70] is the same standard as formerly employed,[71] the ab-

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[63] *Id.* at 202; *see* note 34 *supra*. Earlier in his opinion Justice Walker stated that although many courts, including Mississippi, had cautioned against use of the sudden emergency instruction, no other court had abolished the sudden emergency doctrine altogether. 392 So. 2d at 202.

[64] 392 So. 2d at 202. Justice Walker predicted that the abrogation of the doctrine by the majority will leave both the bench and the bar "in the dark trying to devise new instructions with new wording based on new theories which will in my judgment cause more errors and more appeals than we have had in the past." *Id.* He concluded that the court's decision would "create chaos out of what is presently a little confusion." *Id.*

[65] *See* notes 29 and 36 *supra*.

[66] *See* note 2 *supra*.

[67] *See* note 60 *supra*.

[68] For the defendant's testimony on the circumstances leading up to the accident, see note 2 *supra*. According to the dissent, in determining whether a sudden emergency instruction is warranted by the evidence, and thus whether a sudden emergency actually existed, the testimony must be viewed in the light most favorable to the party invoking the doctrine. 392 So. 2d at 200 (Walker, J., dissenting).

[69] Sudden emergency instructions are utilized more frequently by defendants than by plaintiffs. *See* note 14 and accompanying text *supra*.

[70] *See* notes 56 through 58 and accompanying text *supra*.

[71] *See* notes 19 through 21 and accompanying text *supra*.

sence of the magical words "sudden emergency" and the corresponding images they create in the minds of jurors will probably affect the way an actor's conduct is judged. This seems to be the effect desired by the court, which, in expressing the view that the sudden emergency doctrine often tended to increase unfairly the plaintiff's burden of proof,[72] sided with other authorities who concluded that the instruction unfairly favors the party invoking it because of the emphasis the doctrine places on the circumstances encountered by that party.[73] Thus, in seeking to simplify the consideration of the negligence question for jurors, the court may also succeed in ensuring unbiased and evenhanded application of justice in cases based on sudden emergency. The role of counsel should now shift from one of emphasizing the words "sudden emergency" to one of stressing the reasonableness of actions under the circumstances. It is inevitable that some confusion will result as attorneys attempt to formulate a new instruction which will place their client's conduct in the best possible light, yet conform to the test set forth in this opinion.[74] However, it is submitted that, despite the unavailability of the actual sudden emergency language, such problems may be mitigated by continued adherence to the basic requirements set forth in *Gulf, Mobile & Ohio Railroad v. Withers*.[75]

The decision in the instant case has potential for significance in those jurisdictions which share the Mississippi court's dim view of the sudden emergency doctrine. Indeed, many other state courts have criticized the doctrine in more forceful language than that used by the Mississippi Supreme Court prior to this decision.[76] Accordingly, the prospect of additional courts abrogating the doctrine is not at all unlikely. Other courts seeking to take similar action may point to the fact that the doctrine has, in many instances, proved to be unworkable and counterproductive.[77] It is apparent from any perspective, however, that only the passage of time will allow an accurate appraisal of the court's

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[72] *See* text accompanying note 55 *supra*.

[73] *See* notes 41 and 43 *supra*.

[74] *See* note 64 and accompanying text *supra*.

[75] 247 Miss. 123, 132-33, 154 So. 2d 157, 160 (1963). For a discussion of this case, see text accompanying notes 37 and 38 *supra*.

[76] *See* notes 41 and 43 through 47 *supra*.

[77] Compare the language used in the Mississippi and New Jersey decisions quoted at notes 40 and 41 *supra*.

solution to the difficulties presented by the sudden emergency doctrine.

Douglas J. Gunn

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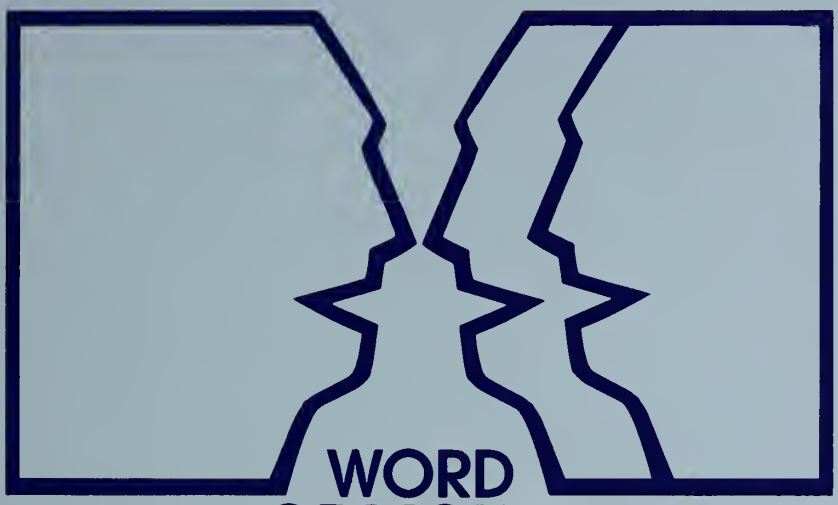

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